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Supreme Court of the United States

OCTOBER TERM, 1957

No. 77

MOOG INDUSTRIES, INC., PETITIONER,

vs.

FEDERAL TRADE COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1957
CERTIORARI GRANTED MARCH 25, 1957

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15,370.

CIVIL.

MOOG INDUSTRIES, INC.,
PETITIONER,

VS.

FEDERAL TRADE COMMISSION,
RESPONDENT.

PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION.

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UNITED STATES OF AMERICA

Before

FEDERAL TRADE COMMISSION

Docket No. 5723

In the Matter of

MOOG INDUSTRIES, INC.

COMPLAINT.

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of Subsection (a), Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One: Respondent Moog Industries, Inc., formerly titled St. Louis Spring Company, is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri.

Paragraph Two: Respondent is now, and for several years last past has been, engaged in the business of the manufacture, sale and distribution of automotive products and supplies to different purchasers of the same located in the various States of the United States and in the District of Columbia. Said products and supplies are sold by the respondent for use, consumption or resale within the United States and the District of Columbia, and respondent causes said products and supplies so sold to be shipped and transported from the State or States of location of its places of business to the purchasers thereof located in States

other than the State or States wherein said shipment or transportation originated. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products and supplies among and between the States of the United States and in the District of Columbia.

Paragraph Three: Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been engaged in active and substantial competition with other corporations, partnerships, firms, and individuals manufacturing, selling, and distributing comparable automotive products and supplies in commerce to purchasers of the same in manner and method and for purposes as aforestated. Many of said purchasers and many of the aforesaid purchasers from the respondent are competitively engaged each with the other.

Paragraph Four: Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been, directly or indirectly discriminating in price between the aforesaid different purchasers of its said automotive products and supplies of like grade and quality sold and distributed in manner and method and for purposes as aforestated, by selling said products and supplies at higher and less favorable prices to numerous small businessmen purchasers than said products and supplies are sold to various larger purchasers generally competitively engaged as aforestated with said less favored purchasers.

Paragraph Five: The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said automotive products and supplies of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent, said favored purchasers, or with customers of either of them.

Paragraph Six: The aforesaid acts and practices of respondent constitute violations of the provisions of Sub-

section (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Wherefore, the Premises Considered, the Federal Trade Commission, on this 20th day of December, A. D. 1949, issues its complaint against said respondent.

NOTICE.

Notice is hereby given you Moog Industries, Inc., a corporation, respondent herein, that the 3rd day of February, A. D. 1950, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VIII) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and the Commission may proceed to make its findings as to the facts and conclusions based upon such answer and enter its order disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to other intervening procedure, including a hearing upon proposed conclusions of fact or law, in which event he may in accordance with Rule XXIV file his brief directed solely to the questions reserved.

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 20th day of December, A. D. 1949.

By the Commission.

/s/ D. C. Daniel
Secretary

(Part 1, Page 2) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Motion for Bill of Particulars.

(Federal Trade Commission Received Jan 16 1950 Secretary)

Now comes the respondent and moves for a Bill of Particulars in the above entitled matter, specifying in particular the following:

1. The dates on which the acts complained of are alleged to have occurred.

2. The names and addresses of persons who have received the alleged discriminatory terms.

(a) The names and addresses of persons alleged to have been discriminated against.

3. The places at which said acts are alleged to have been committed.

4. A description of the nature of the alleged direct and indirect discriminations in price.

5. A description of the practices of the respondent alleged to constitute violations of subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. B), as amended by the Robinson-Patman Act.

Moog Industries, Inc.,
by /s/ H. A. Apple

January 10, 1950.

I hereby certify that the above motion is not interposed for purposes of delay in the disposition of the above entitled matter.

/s/ Edwin S. D. Butterfield
Attorney for Moog Industries, Inc.
111 W. Washington St.
Chicago 2, Illinois

(Part 1, Page 6) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

ORDER DENYING MOTION FOR BILL OF PARTICULARS.

This matter coming on to be heard by the Commission upon the motions of counsel for respondent filed January 16, 1950, for extension of time in which to file answer and for a bill of particulars and answer in opposition to respondent's motions as filed by counsel supporting the complaint January 17, 1950, and the Commission having duly considered said motions and answer thereto and record herein and now being fully advised in the premises:

It Is Ordered that the time in which respondent may answer the complaint herein be, and the same hereby is, extended to February 15, 1950.

It further appearing to the Commission that the complaint, in Paragraph Four, alleges that respondent, in the course and conduct of its business is now, and since June 19, 1936, has been, discriminating in price by selling its automotive products and supplies of like grade and quality in commerce to numerous small businessmen purchasers at higher and less favorable prices than said products and supplies are sold to other larger purchasers generally competitively engaged with said less favored purchasers; and

It appearing that the evidence relied upon by counsel supporting the complaint was either supplied by the respondent or said purchasers who had obtained it from respondent, or developed as a result of the respondent's business practices and policies; and

The Commission being of the opinion that the complaint is sufficient to advise the respondent of the nature of the charges against it, and, further that the specific acts and practices bearing on said charges may be obtained by the respondent from its own records:

It Is Further Ordered that respondent's motion for bill of particulars be and it hereby is denied.

By the Commission.

O. K. Carson — s/ D. C. Daniel

Issued: January 20, 1950. — Secretary

(Part 1, Page 11) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

AMENDED ANSWER.

(Federal Trade Commission Received Jun 20 1950 Secretary.)

Now comes the respondent and denies that it has violated since June 19, 1936, the provisions of Subsection (a), Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., Title 15, Section 13), and further denies that it is now violating said act or any part thereof, and specifically alleges that it is conducting its businesss in a legal and lawful manner in accordance with the laws of the United States, and the Statutes in such cases made and provided, and for answer to the Complaint heretofore filed herein, admits that it is a Missouri corporation with principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri, and that it is engaged in the manufacture of automotive products, which said products manufactured by it are sold to resellers in a legal manner and accordance with the custom and practice prevailing in the automotive industry.

1. Respondent denies each and every allegation of said complaint not hereinbefore specifically admitted and asks for strict proof thereof.

2. Further answering, Respondent states that of the type of automotive products manufactured by it, almost all of such automotive products are manufactured by or distributed through the three major car manufacturers, and their subsidiaries; that respondent follows the pricing, pricing methods, and trade practices established by said car manufacturers, their suppliers and subsidiaries, in order to meet in good faith the equally low price of such competitors, or the services or facilities furnished by such competitors.

3. Alleges that if the conclusions stated in paragraphs Four, Five and Six of said Complaint as to the alleged acts and practices of the respondent, are deemed to constitute violations of the provisions of Subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, then said Act if so interpreted and if applied to the respondent

is violative of Respondent's constitutional rights under Article V of the Amendments to the Constitution of the United States and an unreasonable and unlawful exercise of the power granted under Subsection Three of Section 8 of Article I of the Constitution of the United States.

4. Alleges that the provisions of Subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, are so vague and indefinite that an attempt to enforce said provisions in this proceedings against this respondent would constitute a violation of respondent's Constitutional rights under Article V of the Amendments to the Constitution of the United States.

5. Respondent further states that the practices and conditions existing in the Motor Vehicle Industry in regard to competition as set forth in the one thousand and seventy-seven (1,077) page report of this Honorable Commission to the House of Representatives on June 5, 1939, on the Motor Vehicle Industry, pursuant to Joint Resolution No. 87 (H. J. Res. 594), Seventy-Fifth Congress, Third Session, and known as House Document No. 468, 76th Congress, 1st Session, have become more widespread in usage and conditions have not improved but rather deteriorated over the last decade, making it increasingly more and more difficult for the small manufacturer, such as the respondent, to efficiently compete in the market for the products manufactured by it or to secure the benefit of competitive pricing in the field of its raw materials.

6. That any cease and desist order entered herein against this Respondent under the conditions now existing in the Motor Vehicle Industry, without the correction of said conditions, will not promote competition but will rather destroy the competition in the industry now being offered by this Respondent.

7. Respondent prays that this Honorable Commission will exercise the powers given to it to protect this Respondent and other similar small automotive manufacturers in their competitive positions against the existence and growth of monopoly power both in the markets in which the re-

spondent purchases its raw materials and in which the Respondent sells its finished products.

Moog Industries, Inc.,
By /s/ Edwin S. D. Butterfield
Its Attorney at Law

St. Louis, Missouri
June 20, 1950

Edwin S. D. Butterfield,
Attorney for Respondent,
111 W. Washington Street,
Chicago 2, Illinois.

(Part 1, Page 17) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

MOTION TO QUASH SUBPOENAS.

(Federal Trade Commission Received Oct 19 1950 Secretary.)

Now comes Moog Industries, Inc., a corporation, respondent in the above entitled matter by Edwin S. D. Butterfield, its attorney herein, and moves to quash the *subpoenas ad testificandum and duces tecum* heretofore issued herein on the grounds set forth in the answer and amended answer heretofore filed herein, and on the following grounds:

That the Federal Trade Commission is without jurisdiction of the person or the subject matter of said complaint in that said complaint is directed against this respondent which does not manufacture or sell more than a fraction of one percent of the competitive commodities of like grade and quality sold in the American market; that said proceeding and compulsory process violates the constitutional rights of the persons under subpoena and is beyond the scope and power granted to the Congress of United States under Section 8 of Article I of the Constitution of the United States of America; that said purported process is in violation of fundamental legal rights of the persons sub-

poenaed, being contrary to and in derogation of the fundamental purpose of American government as exemplified in the preamble of the Constitution of the United States; and that the rights of said persons are by said subpoena being placed in jeopardy in violation of the IV, V, VI, VIII, IX, X, XIII and XIV Amendments to the Constitution of the United States of America.

Moog Industries, Inc.
By: /s/ Edwin S. D. Butterfield
Attorney for Respondent

St. Louis, Missouri
October 19, 1950

(Part 1, Page 27) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

AFFIDAVIT.

H. P. Moog, being first duly sworn upon his oath, states that he is President of Moog Industries, Inc., respondent in the above entitled matter; that he has been engaged in the sales of automotive products for 31 years; that Moog Industries, Inc., does not manufacture, sell or deliver an amount equal to more than 1/10 to 1/100 of one percent on some of its manufactured products and less than one percent on all of its products of the total amount of said products of like grade and quality manufactured and sold in the United States and any other market; that Moog Industries, Inc., is a small business concern in the automotive market; and that said fact is a matter peculiarly within the power, knowledge and capacity of the Federal Trade Commission to ascertain.

/s/ H. P. Moog

Subscribed and sworn to before me, a Notary Public, this 19th day of October, 1950.

My term expires: 11/15/50

/s/ Charles S. Sigoloff
Notary Public

(Part 1, Page 28) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

MOTION TO STRIKE EXHIBITS AND EVIDENCE AND DISMISS COMPLAINT.

(Federal Trade Commission Received Jun 4 1952 Secretary.)

Now comes respondent, Moog Industries, Inc., by E. S. D. Butterfield, its attorney, and upon affidavit of its president H. P. Moog that said respondent does not manufacture, sell or deliver in excess of one percent of the amount or quantity of any product or item of like grade and quality now being manufactured, sold and delivered in interstate commerce in the United States of America and moves to strike all exhibits and testimony heretofore received in evidence herein on the ground

1. that there is no pricing practice of Moog Industries, Inc., which could by the extension of the interpretation of the Robinson-Patman Act to the extreme limits of its lawful intent possibly result in a discrimination which might have the effect substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them;

2. that the relative insignificance of the respondent's participation in the Automotive market of the United States was brought to the attention of the Federal Trade Commission by proper affidavit shortly after the complaint was filed herein:

3. that no evidence has been introduced to the contrary herein;

4. that the evidence heretofore introduced herein over objection of the respondent fails in any manner to establish a violation of the Robinson-Patman Act or any other provision of the anti-trust laws and

5. that to compel respondent to proceed to further defend against said complaint will incur needless onerous expense and place an unconscionable burden on the respondent beyond the contemplation, intent, or power of Congress and in denial of due process of law to respondent in direct violation of respondent's constitutional rights and in complete perversion of the authority, intent and power of Congress and the Federal Trade Commission in the premises.

Moog Industries, Inc.
By /s/ Edwin S. D. Butterfield
Attorney for respondent

June 2, 1952.

(Part 1, Page 41) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

AFFIDAVIT.

H. P. Moog, being first duly sworn upon his oath deposes and says that he is president of Moog Industries, Inc., respondent herein; that he has been engaged in the sale of automotive products for over thirty-three years, and further deposes and says that there is no item being manufactured, sold or delivered by Moog Industries, Inc., which exceeds in amount or quantity one percent of the amount or quantity of a like item of the same grade and quality manufactured, sold or delivered in interstate commerce in the United States of America.

/s/ H. P. Moog

Subscribed and sworn to before me this 2nd day of June, A. D. 1952.

/s/ Mary A.
Notary Public

My Comm. expires Dec. 2, 1955

(Part 1, Page 42) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

MOTION FOR BILL OF PARTICULARS.

(Federal Trade Commission Received Jun 4 1952 Secretary)

Again comes the respondent, Moog Industries, Inc., by E. S. D. Butterfield, its attorney, at the conclusion of the evidence on behalf of the Federal Trade Commission in the above entitled matter and moves for a Bill of Particulars in the above entitled matter, specifying in particular the specific discrimination charged against the respondent and wherein the Federal Trade Commission charges that:

1. The effect thereof may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or

2. The effect thereof may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them; and

3. The particular customer or customers which the Federal Trade Commission charges has or have been discriminated against within the purport, meaning and intent of Subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936;

4. The particular pricing practice which the Federal Trade Commission charges is in violation of said Robinson-Patman Act;

5. The particular marketing practice which the Federal Trade Commission charges is in violation of said Robinson-Patman Act;

6. The particular act or acts of the respondent which the Federal Trade Commission alleges constitute a violation or violations of subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act approved June 19, 1936.

Moog Industries, Inc.
/s/ Edwin S. D. Butterfield
Attorney for Respondent.

June 2, 1952

(Part 1, Page 43) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

SUGGESTIONS IN SUPPORT OF FOREGOING MOTION FOR A BILL OF PARTICULARS.

1. Motion for Bill of Particulars was heretofore made before hearings were commenced in said matter and same was denied, the answer of counsel in support of complaint to motion for Bill of Particulars and the order denying said motion being served on respondent's attorney in the same registry mail.

2. An examination of all documents in evidence and all testimony adduced in support of the Complaint consisting of 506 pages of testimony and approximately 1350 pages of Exhibits does not reflect in what manner or respect the Federal Trade Commission charges an alleged violation of the Robinson-Patman Act.

3. The failure to specify the alleged violation will cause aggravated and unnecessary expense to the respondent for

the reason that the record fails to specify in what manner or how the respondent is purported to have offended the provisions of the Robinson-Patman Act.

4. Appended hereto is the Affidavit of the president of the respondent alleging that the respondent does not manufacture, sell or deliver more than one percent of any item of like grade and quality manufactured, sold or delivered in interstate commerce in the United States of America.

5. That to require the respondent to show the economic and marketing conditions in the automotive industry in order to properly negative the charges made in the complaint in the absence of a Bill of Particulars specifying the acts relied upon in support of said charges and official notice taken of matters dehors the record is to place an unconscionable burden upon the respondent, denying to it due process of law and effecting a result opposite to that contemplated by Congress, namely: handicapping instead of protecting the small manufacturer's right to compete in interstate commerce.

(Part 1, Page 44) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

AFFIDAVIT.

H. P. Moog, being first duly sworn upon his oath deposes and says that he is president of Moog Industries, Inc., respondent herein; that he has been engaged in the sale of automotive products for over thirty-three years, and further deposes and says that there is no item being manufactured, sold or delivered by Moog Industries, Inc. which exceeds in amount or quantity one percent of the amount or quantity of a like item of the same grade and quality manufactured, sold or delivered in interstate commerce in the United States of America.

s H. P. Moog

Subscribed and Sworn to before me this 2nd day of June, A. D. 1952.

/s/ Mary A.
Notary Public

My Comm. expires Dec. 2, 1955.

(Part 1, Page 45) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

MOTION FOR BILL OF PARTICULARS DENIED.

(Part 2, Page 509) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

ORDER TO SHOW CAUSE.

(Federal Trade Commission Received Mar 6 1953 Records Serv DCD Secretary)

This matter is before the Hearing Examiner upon request by counsel for the respondent to set a hearing at Wichita, Kansas, for approximately one week.

On March 4, 1952, the attorneys in support of the complaint stated upon the record that they were closing their case in chief and thereafter the following hearings were held to receive evidence offered by respondent: St. Louis, Missouri, June 2, 1952, two days; Denver, Colorado, October 13, 1952, two days; Dallas, Texas, October 21, 1952, two days; New Orleans, Louisiana, October 27, 1952, two days; Memphis, Tennessee, November 19, 1952, two days; and New York, New York, January 12, 1953, three days.

With the exception of the St. Louis hearing and one day of the Memphis hearing all testimony was confined to that of jobber customers as to whether or not they had been competitively injured by respondent's pricing practices. The testimony of all of the witnesses both in direct and

cross examination was substantially the same and to a great extent identical.

At the close of the hearings in New Orleans the Hearing Examiner announced that he considered further testimony of jobber witnesses along the same line to be cumulative. Upon representation that testimony of witnesses in the New York area would be of a different nature a further hearing was set for New York. At this hearing the testimony of the witnesses was substantially the same as that of the previous witnesses called.

At both the hearings in New Orleans and New York City the attorneys in support of the complaint offered to stipulate that if additional jobber witnesses are called their testimony on both direct and cross examination will be substantially the same as the testimony of the jobber witnesses previously called in this proceeding.

The Hearing Examiner, being of the opinion that, in the absence of a showing to the contrary, the further testimony of jobber customers would be cumulative to that already adduced in this proceeding and that further hearings to take such testimony would not be warranted;

It Is Therefore Ordered that hearing to show cause why hearing should be held at Wichita, Kansas, be set for Friday, March 13, 1953, at 10:00 A. M., EST, in Room 332, Federal Trade Commission Building, Washington, D. C.

/s/ Earl J. Kolb
Hearing Examiner.

March 5, 1953.

(Part 1, Page 50) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

ANSWER TO ORDER TO SHOW CAUSE WHY HEARING SHOULD BE SET IN WICHITA, KANSAS.

(Federal Trade Commission Received Mar 20 1953 Secretary.)

On October 8, 1951, and March 4, 1952, at Washington, D. C., the attorney in support of the Complaint offered in

evidence Exhibits Nos. 61 to 79G in the above entitled cause consisting of twenty-eight (28) pages and including Six hundred twenty-three (623) items purporting to show illegal price differences in the sale of commodities by the respondent to the purported purchasers named therein in a total of Two hundred thirty-six (236) communities in twenty-three (23) States of the United States including:

Alabama	New Jersey
Arkansas	New Mexico
Colorado	New York
District of Columbia	North Carolina
Florida	Oklahoma
Georgia	Pennsylvania
Iowa	South Carolina
Kansas	Tennessee
Kentucky	Texas
Louisiana	Virginia
Mississippi	West Virginia
Missouri	

Said Exhibits did not specify any particular item purported to have been sold nor was there any evidence offered to establish that the commodities sold were in fact either competitive, similar or identical.

(Part 1, Page 54) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Over objection of counsel said Exhibits were received in evidence by the hearing Examiner and were included in and made a part of the record under the Complaint.

Without producing a single witness to testify that any business enterprise named in said Exhibits, or not named therein, has been or would be injured competitively by any pricing practice of the respondent and without producing a single witness who testified that the effect of such differences might substantially lessen competition or tend to create a monopoly in any line of commerce sold by respondent, or to injure, destroy, or prevent competition with

any person who either grants or knowingly receives the benefit of such differences, or with the customers of either of them, the attorneys in support of the Complaint, which charged the respondent with the sole offense of violation of Subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, closed the Government's case.

Immediately upon the denial of respondent's motion to refuse said exhibits in evidence on March 2, 1952, the following took place:

"Mr. Mayer: Mr. Examiner, this closes the case for counsel in support of the Complaint.

Mr. Butterfield: If your Honor please, at this time I make a motion to dismiss the Complaint and ask that a time be set for hearing on an argument.

(Part 1, Page 55) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Trial Examiner Kolb: You can proceed with the argument, if you wish, now.

Take a recess of about five minutes and then proceed with your argument."

Despite the argument as to the failure of proof the motion to dismiss the Complaint was denied.

Thereupon the matter was set for hearing on June 2, 1952, at which time the motion to strike said Exhibits was renewed and again denied.

Thereupon the motion for Bill of Particulars was renewed and again denied.

Thereupon the motion to impound said Exhibits was renewed and again denied.

Whereupon the respondent had identified and offered in evidence charts relating to certain of said Exhibits which demonstrated that the items purchased by the respective purchasers shown on said Exhibits were neither identical nor similar but were in fact not competitive with one another together with the supporting invoices which said

charts and invoices were refused in evidence on the ground that whether or not the items sold to the respective purchasers were in fact non-competitive was irrelevant to the charge of competitive injury.

Whereupon the respondent offered in evidence the entire invoices showing sales to customers shown on F.T.C. Exhibit 67 covering Birmingham, Alabama together with charts analyzing all the items embraced in the figures shown on F.T.C.

(Part 1, Page 56) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Exhibit 67 which said charts were refused in evidence although the invoices supporting the same were so received.

Whereupon Respondent requested settings for the purpose of taking testimony of the persons named in F. T. C. Exhibit 67 residing in Birmingham, Alabama but no hearing was ever set for said purpose although respondent needs such testimony for the purpose of properly defending itself against said complaint.

Hearings were set for Denver, Colorado respecting F. T. C. Exhibit No. 66; for Dallas, Texas respecting F. T. C. Exhibits Nos. 73, 74, 76 and 79F; for New Orleans, Louisiana respecting F. T. C. Exhibit Nos. 62, 72, 78, 79C; for Memphis, Tennessee respecting F. T. C. Exhibits Nos. 61, 70A, 71B, 78, and 79F; for New York City, New York respecting F. T. C. Exhibits Nos. 63, 64, 68; and for Des Moines, Iowa respecting F. T. C. Exhibit No. 65, but no specific date has yet been set for the last named hearing.

F. T. C. Exhibit No. 76 recites names of purported purchasers of Moog products in dollars and cents relating to sales in El Dorado, McPherson, Wichita and Winfield, Kansas, as well as purported sales in Arkansas, Oklahoma, Texas and New Mexico.

At the hearings at which persons named on the F. T. C. Exhibits were called most of the witnesses testified that they have not been injured competitively by the pricing practices of the respondent and

although great latitude was extended to the attorneys in support of the Complaint in cross examination,

(Part 1, Page 57) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

no witness called testified to any competitive injury by virtue of the pricing practices of the respondent.

Each community stands on its own particular facts and no two witnesses have testified to the same business experience. However, because of the enormous burden placed upon the respondent to meet the facts in each particular instance in 236 communities in the 23 States which the Government Exhibits Nos. 61 to 796 inclusive, the respondent has offered to stipulate that if all the witnesses named in said Exhibits were called, each would testify that he knows whether or not he was and is being injured competitively by virtue of the pricing practices of the respondent and that based upon that knowledge he would testify that he was not and is not being competitively injured by said pricing practices and that each would testify on cross-examination substantially the same as those who have already been called.

To allow the F. T. C. Exhibits Nos. 61 to 79G to remain in evidence as not being cumulative and to deny the respondent the opportunity to meet that evidence on the ground that it would only be cumulative would be in effect allowing the Government to freely put in the record evidence which the respondent is not allowed to rebut and such a ruling would amount to a flagrant denial of due process, a failure to permit, allow and grant a fair and impartial hearing and a direct violation of the rights guaranteed to the respondent under the Constitution of the United States of America and the Amendments thereto.

(Part 1, Page 58) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

The respondent again moves to strike Government Exhibits 61 to 79G inclusive; and if such motion is denied, the

respondent again moves that the Government be required to make an election as to on what facts and in what area it intends to rely in support of the Complaint and upon the failure to make a reasonable election in regard thereto that the complaint be dismissed; and that if both such motions are denied that the Hearing Examiner set such hearings at such reasonable times as will afford the respondent an opportunity to meet the Complaint and rebut the evidence received herein on behalf of the Government and over respondent's objection.

Moog Industries, Inc.
By /s/ E. S. D. Butterfield
Attorney for Respondent
111 West Washington Street
Chicago 2, Ill.

(Part 1, Page 59) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Motion denied upon the record at hearing held June 23, 1953, at Washington, D. C.

/s/ Earl J. Kolb
Hearing Examiner

(Federal Trade Commission Received Jun 23, 1953 Secretary.)

Moog Industries, Inc. by E. S. D. Butterfield its counsel moves that the Hearing Examiner issue a rule on the attorneys in support of the Complaint to make the following elections:

1. Which of the many hundreds of commodities being sold by the respondent do the attorneys in support of the Complaint maintain are or have been sold by the respondent in violation of section 2(a) of the Clayton Act (Robinson-Patman Amendment) (U. S. C. Title 15, Sec. 13.)

2. Which of the effects, direct or indirect, do the attorneys in support of the Complaint maintain the respondent have been or are adversely and unlawfully affecting interstate commerce in violation of the Robinson-Patman Act (U. S. C. Title 15, Sec. 13).

3. In which of the 235 communities in 23 states as shown on the tabulations offered over objection and received in evidence herein do the attorneys in support of the Complaint maintain that sales by the respondent have been or are being made in violation of the Robinson-Patman Amendment to Section 2 of the Clayton Act, U. S. C. Title 15, Sec. 13.

4. Which of the following effects do the attorneys in support of the Complaint maintain that sales made by the respondent have, or are having and charged to be in violation of U. S. C. Title 15, Sec. 13:

(Part 1, Page 63) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

(a) substantially to lessen competition

(b) tend to create a monopoly

(c) to injure competition

(d) to destroy competition

(e) to prevent competition

5. To which of the following persons do the attorneys in support of the Complaint maintain that any one of the effects set forth in paragraph 4 above result in competitive injury, destruction, prevention, lessening or monopolizing in respect to commodities which have been or are being sold by respondent:

(a) a competitor

(b) a customer knowingly receiving

(c) a customer of a competitor

(d) a customer of respondent

(e) a knowing customer of respondent's customer

(f) a customer's customer

6. In which one of the many months shown on the exhibits offered by the attorneys in support of the Complaint do said attorneys maintain that the violations charged in the Complaint occurred.

Respondent further moves that the attorneys in support of the Complaint be required to answer said rule upon a short date to be set for hearing upon said rule and answer and that upon default of answer thereto that the Complaint against the respondent be dismissed forthwith.

As grounds for said motions respondent respectfully represents that by virtue of the undue proliferation of the evidence by the attorneys in support of the Complaint who have offered, and there have been received, over objection of respondent, in evidence voluminous tabulations of dollar amounts and percentage extensions of differences as small as one one hundredth of one percent without regard to the hundreds of commodities

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included in a single figure and involving many thousands of invoices in hundreds of communities in almost half of the United States covering sales over many many months and years, there has been placed upon the respondent an almost insurmountable burden of analysis and proof, requiring the breakdown of thousands of invoices and cost allocations requiring the addition of thousands of man hours of time, extensive, exhorbitant and needless expense and causing such delay and obstruction to the proper and judicious disposition of this matter on its merits to the extent that a fair and impartial hearing without needless delay is in effect so denied to the respondent as to amount to a denial to this respond-

ent of a fair and impartial hearing as provided by Congress under the Administrative Procedure Act, Title 5, Sections 1004, 1006 and 1011 and as guaranteed by the Fifth Amendment to the Constitution of the United States of America and so as to deny the respondent a hearing conducted consistently with fundamental principles which inhere in due process of law and in denial and disparagement of those rights not enumerated in the Constitution or the amendments thereto but guaranteed by the Ninth Amendment of the Constitution of the United States of America as being retained by the sovereign people.

Moog Industries, Inc.
By /s/ E. S. D. Butterfield
Counsel for Respondent.

(Part 1, Page 65) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

(Motion to Elect was denied at Part 3, Page 962.)

NOTICE OF INTENTION TO APPEAL FROM HEARING EXAMINER'S DENIAL OF MOTION FOR RULE ON ATTORNEYS IN SUPPORT OF COMPLAINT TO MAKE CERTAIN ELECTIONS.

(Federal Trade Commission Received Jul 2, 1953 Secretary.)

Now comes Moog Industries, Inc. by E. S. D. Butterfield its attorney and files this its notice of intention to appeal from the denial of motion by respondent for a rule on attorneys in support of the Complaint herein to make certain elections set forth in said motion filed on June 23, 1953, and denied by the Hearing Examiner on the same day. Re-

spondent represents that the prompt decision of such appeal is necessary to prevent unusual delay and expense.

Moog Industries, Inc.
By /s/ E. S. D. Butterfield
Attorney for Respondent.

(Part 1, Page 78) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

ORDER DENYING APPEAL.

This matter came on to be heard by the Commission upon respondent's appeal filed on July 20, 1953, from the ruling by the hearing examiner denying respondent's motion that the hearing examiner issue a rule on the attorneys in support of the complaint to make certain specified elections, and upon answer to said appeal filed by counsel supporting the complaint.

Respondent's appeal is an interlocutory appeal. Rule XX of the Commission's Rules of Practice provides that, with certain exceptions not here pertinent, "parties shall have the right to prosecute interlocutory appeals from rulings of a hearing examiner during the time the proceeding is pending before him only when it is shown to the satisfaction of the Commission that the prompt decision of such appeal is necessary to prevent unusual expense and delay and such showing shall be made in the appeal." In order to justify an interlocutory appeal a party must show that the unusual expense involved is other than that usual and necessary in adversary proceedings. The respondent has made no such showing.

(Part 1, Page 95) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

The Commission having duly considered respondent's appeal and the answer thereto, and being of the opinion

that respondent has failed to show that a prompt decision on its appeal is necessary to prevent unusual expense and delay:

It Is Ordered that respondent's appeal from the ruling of the hearing examiner denying respondent's motion that the hearing examiner issue a rule on the attorneys in support of the complaint to make certain specified elections be, and it hereby is, denied.

By the Commission.

/s/ D. C. Daniel
Secretary

Issued: July 31, 1953

E. H.

(Part 1, Page 96) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of MOOG INDUSTRIES, INC., a corporation, formerly titled ST. LOUIS SPRING COMPANY, a corporation	Docket No. 5723

To the Honorable Earl J. Kolb, Hearing Examiner:

RESPONDENT'S PROPOSED FINDINGS AND CONCLUSIONS.

(Federal Trade Commission Received Jan 11 1954 Secretary.)

(The following proposed findings and conclusions are submitted in compliance with Rule XXI of the Commission's Rules of Practice for consideration by the Hearing Examiner, upon the condition that in so doing, the respondent, Moog Industries, Inc., does not thereby waive any of the factual, legal or procedural questions in the record

of this proceeding which it may subsequently present to the Commission or the Courts for decision.)

Respondent, Moog Industries, Inc., formerly titled St. Louis Spring Company, is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri.[1]

Respondent is now, and for several years last past has been engaged in the business of the sale and distribution of certain automotive products, to wit: coil action parts, leaf springs, coil springs, chassis parts and piston rings, to different purchasers of the same, located in the various States of the United States and in the District of Columbia.[2] Some of said products are purchased by respondent for resale while others are manufactured and sold as aforesaid.[3] All of said products are sold by the respondent for resale within the United States and the District of Columbia, and respondent causes said products so sold to be shipped and transported from the State or States of location of its places of business to the purchasers thereof located in States other than the State or States wherein said shipment or transportation originated.[4] Respondent maintains (Part 1, Page 102), and at all times mentioned herein has maintained, a course of trade and commerce in said products among and between the States of the United States and in the District of Columbia.[5]

Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been, engaged in active, but not in substantial, competition with other corporations, partnerships, firms, and individuals manufacturing, selling and distributing comparable automotive products in commerce to purchasers of the same in manner and method and for purposes as aforestated.[6] While many of said purchasers and many of the aforesaid purchasers from the respondent may be competitively engaged each with the other, as alleged in the Complaint, the evidence wholly fails to identify specifically which purchasers are competitively engaged with other specifically identified purchasers.[7]

The Complaint charges that "Respondent, in the course and conduct of its business as aforesaid, is now, and since

June 19, 1936, has been, directly or indirectly discriminating in price between the aforesaid different purchasers of its said automotive products and supplies of like grade and quality sold and distributed in manner and method and for purposes as aforestated, by selling said products and supplies at higher and less favorable prices to numerous small businessmen purchasers than said products and supplies are sold to various larger purchasers generally competitively engaged as aforestated with said less favored purchasers."[8]

The Complaint also charges that "The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said automotive products and supplies of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent, said favored purchasers, or with customers of either of them."[9]

Analysis of the foregoing charges demonstrates that the violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C., Section 13, charged against the respondent is limited to the allegation of discriminating in price

(a) in the sale of automotive products and supplies "of like grade and quality";

(b) between "small businessmen purchasers" and "larger purchasers";
(Part 1, Page 103.)

(c) at higher and less favorable prices to the "small businessmen purchasers" than to the "larger purchasers"; and

(d) between different purchasers competitively engaged in the resale of automotive products and supplies of like grade and quality purchased from respondent;

and to the allegation that the effect of respondent's aforesaid discriminations in price between the said different

purchasers of its said automotive products and supplies of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially

(e) to lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged;

(f) to injure, destroy or prevent competition with the respondent;

(g) to lessen competition or tend to create a monopoly in the line of commerce in which the aforesaid favored (larger) purchasers are engaged;

(h) to injure, destroy or prevent competition with said favored (larger) purchasers; or

(i) to injure, destroy or prevent competition with customers of either the respondent or said favored (larger) purchasers.[10]

Respondent specifically denied the alleged violation of the aforesaid statute[11] and upon the issue joined evidence in support of and in opposition to the foregoing charges was heard by the Hearing Examiner.[12]

To support the Complaint the testimony of three officers of the respondent,[13] nine automotive parts jobbers,[14] the Presidents of two incorporated groups of automotive parts jobbers,[15] and two FTC accountants[16] was taken and Commission Exhibits numbered 1 to 79, inclusive, with many lettered series, were introduced.[17] (Part 1, Page 104)

In opposition the testimony of three officers of the respondent,[18] eighteen automotive parts jobbers,[19] the Secretary-Treasurer of an incorporated group of automotive parts jobbers,[20] and a stipulation relative to the testimony of additional automotive parts jobbers was taken[21] and Respondent's Exhibits 5 to 26, inclusive, with many lettered series, were introduced.[22]

The evidence, as a whole, tends to establish the general system of pricing used by the respondent in the sale and distribution of its automotive products and supplies.[23] This system of pricing, which includes published cumulative volume rebates or discounts that are available to all

purchasers according to the quantity purchased during a given period of time, is typical of the systems of pricing used generally throughout the automotive replacement parts industry by independent manufacturers of automotive products and supplies, including respondent's competitors, in the sale and distribution of such products and supplies.[24]

With respect to the two percent cash discount allowed by respondent as a trade practice for payment of an invoice within a certain number of days after the date of the invoice and prior to the usual net payment thereof, such trade discounts are uniform and are extended to all purchasers.[25] There is no reliable, probative and substantial evidence to the contrary and such discounts are without question legally valid.[26]

The automotive producers and supplies sold and distributed by the respondent are identified as coil action parts, leaf springs, coil springs, chassis parts and piston rings.[27] The classification "leaf springs, coil springs and chassis parts" is a general term designed by the respondent as a catch-all to include everything but coil action parts and piston rings. It includes five separate distinct classes of parts, namely, leaf springs, coil springs, tie rod ends, shackles and king bolts.[28] These types of automotive products and supplies are not interchangeable[29] and each type includes non-interchangable parts, particularly those designed for different makes of automobiles and trucks.[30]

The meaning of the phrase "commodities of like grade and quality" as used in Section 2(a), above referred to, has not been the subject of any close court contest or Commission decision, and there are therefore no judicial or quasi-judicial opinions subjecting the language to any very searching examination. The phrase has, however, been involved in a few cases which clearly support the view that interchangeability should be the controlling test.[31] There are no decisions in conflict with this view and it is herein (Part 1, Page 105) adopted and approved.[32]

The evidence offered to support the Complaint does not establish separate sales of interchangeable automotive

parts at different prices, but depends almost entirely upon charts showing total annual purchases in dollars from which the Commission's accountants have computed allowable volume rebates or discounts.[33]

While the charts list a large number of purchasers and reflect the total amounts of purchases from respondent during certain periods of time, they do not establish that any purchasers named compete in the resale of interchangeable automotive parts purchased from respondent.[34]

Analysis of the testimony taken in support of the Complaint, shows the following: Four jobbers located at New Orleans, Louisiana, testified that they purchased automotive products and supplies from respondent.[35] Two purchased during 1949,[36] one since April, 1949,[37] and one only during 1948.[38] The parts purchased were referred to by each purchaser as follows: (1) springs and front end suspension line,[39] (2) coil springs, leaf springs, king bolt sets, tie rod ends, and coil suspension parts,[40] (3) springs and front end suspension parts,[41] and (4) leaf springs, chassis parts, and coil action parts.[42] Only the total sums paid by each purchaser were given, with no reference to quantity or type of each part purchased.[43] While all four testified that they competed to some extent with other jobbers, not a single competitor was identified, the amount of the resales of each separate type of part, the prices paid, and the identities or functions of the purchasers thereof were not stated.[44] One testified that in reselling parts bought from respondent about ten percent was at retail and the balance went into "our own repair work."[45] The other three testified that they resold respondent's parts about ninety percent wholesale and ten percent retail.[46]

In addition, four jobbers located at Memphis, Tennessee, and one jobber located at Greenwood, Mississippi, testified that they purchased respondent's automotive parts during 1949.[47] It is not shown whether Ozburn & Abston Company (one of the Memphis jobbers) purchased from Ozburn, Crowe and Yantis Company or from the respondent.[48] The parts purchased by all five were referred by each purchaser as follows: (1) flat springs, leaves, coil action parts, and piston rings,[49] (2) front end parts and

springs,[50] (3) front end parts, coil springs, U-bolts and steel,[51] (4) coil action parts,[52] (5) springs, mainly leaves, front end repair parts, and tie bolts.[53] Only the approximate (Part 1, Page 106) sums paid by four purchasers were given in this testimony and there was no reference to the quantity of each type of part purchased.[54] While all five testified that they competed to some extent with other jobbers, not a single competitor was identified, and the amount of the resales of each separate type of part, the prices paid, the identities or functions of the purchasers thereof were not stated.[55]

The testimony of the Presidents of the two incorporated groups of the automotive parts jobbers lists the nine jobbers of one group[56] and seventeen jobbers of another group.[57] This testimony fails to show the quantity of each interchangeable part purchased by each member of these groups. It also fails to show the total amount paid by each member for each interchangeable part. It fails to identify any jobbers competing with any of these members in the resale of a particular interchangeable automotive part.[58]

This testimony is so hopelessly confused and utterly lacking in important and necessary detail that it wholly fails to establish that any of the jobbers referred to are competitively engaged in the resale of automotive products and supplies of like grade and quality, that is interchangeable products and supplies, purchased from the respondent.[59]

In addition there is no evidence (1) establishing the relative size of the jobbers purchasing the respondent's automotive products and supplies, (2) establishing that respondent discriminated in price between "small businessmen purchasers" and "larger purchasers," or (3) establishing that "small businessmen purchasers" paid higher and less favorable prices than "larger purchasers."[60]

From the foregoing the conclusion is reached that the charges above set out in (a), (b), (c), and (d) are not supported by reliable, probative and substantial evidence.[61]

Turning to the determination of the sufficiency or insufficiency of the evidence to support the charges above

set out in (e), (f), (g), (h) and (i) relative to the effect of respondent's alleged discriminations in price analysis thereof shows the following:

In the primary line of commerce the evidence shows that respondent is not engaged in substantial competition with its competitors,[62] that respondent's pricing practices are the general pricing practices in the automotive parts industry employed by independent manufacturers of automotive replacement parts in the sale and distribution of automotive parts,[63] that respondent's competitors have (Part 1, Page 107) in effect competitive pricing practices substantially the same as the pricing practices used by the respondent,[64] that respondent does not occupy a monopolistic position in and has no monopolistic control over any portion of the automotive parts market,[65] that respondent has not engaged in monopolistic practices and its pricing practices have not diverted trade to any substantial degree from its competitors,[66] that there is no evidence of a tendency toward monopoly in the respondent or to indicate any increase in sale of respondent's products over that of a competitor in any market,[67] that there is no evidence establishing that respondent's pricing practices have in the past or may in the future injure, destroy, prevent, or lessen competition with respondent.[68]

In the secondary line of commerce in which the purchasers of respondent's products and supplies are engaged, the evidence fails to establish competition between purchasers in the resale of respondent's automotive products and supplies of like grade and quality, that is, interchangeable parts, purchased from respondent and there is, of course, no injury to competition.[69]

If competition between such purchasers in the resale of respondent's automotive products and supplies of like grade and quality, that is, interchangeable parts, purchased from respondent, is assumed, further assumed that respondent is discriminating in price between such competing purchasers, and still further assumed that the price difference is reflected in resale prices, there is a supportable inference that the effect "may be" to injure competitors of the purchaser receiving the lower price.[70] If in these assumed circumstances it is also assumed that the

inferred injury to competition is "substantial," it may then be said that a prima facie case has been established.[71]

If a prima facie case is considered to have been established by evidence of all of the foregoing assumed facts, the case against the respondent will nevertheless fail since the inference of injury to competitors of the favored purchasers is rebuttable and in this case was completely rebutted by the testimony and a stipulation of fact.[72]

This testimony and stipulation clearly show, without dispute, that while some jobbers would like to receive a larger discount, respondent's larger discounts or rebates were not reflected in resale prices and did not influence or affect resales of respondent's automotive products and supplies.[73] Moreover this testimony and stipulation establish affirmatively that the purchasers receiving the lesser discounts or rebates were not competitively injured,[74] that in buying respondent's products and supplies a (Part 1, Page 108) jobber is not necessarily interested in the cheapest net price; that a jobber may pay more and yet make more profit than if he pays less; that a jobber paying less may have his capital tied up in stock on the shelf, his stock may contain unpopular merchandise (the cats and dogs), the stock may have a slow turnover, the stock may become obsolescent, and maintenance of stock on the shelf adds transportation and bookkeeping costs; and a jobber may prefer to keep his volume of stock low because his business is largely repair work.[75]

There is therefore no reliable, probative and substantial evidence that the effect of respondent's pricing practices may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent, said favored purchasers,[76] or with customers of either of them.[77]

The conclusion is therefore reached, after due consideration of the entire record, that the respondent's pricing

practices do not constitute violations of the Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.[78]

Hearing Examiner

Respectfully submitted,

Moog Industries, Inc.,
Respondent,

By /s/ Edwin S. D. Butterfield
/s/ James W. Cassidy
Attorneys for Respondent

(Part 1, Page 109)

REFERENCES TO THE RECORD--AUTHORITIES RELIED ON.

1. Complaint and Answer, Tr. 6, 7.
2. Complaint and Answer, Tr. 6, 7, 556, 987 to 996.
3. Tr. 1012 to 1014.
4. Complaint and Answer, Tr. 6, 7.
5. Complaint and Answer, Tr. 6, 7.
6. Complaint and Answer, Tr. 6, 7, 367, 987-996, 1012-1014.
7. Complaint and Answer, Tr. 6, 7.
8. Paragraph Four of the Complaint.
9. Paragraph Five of the Complaint.
10. Analysis of charges in Paragraphs Four and Five of the Complaint.
11. Answer.
12. Evidence received at all hearings.
13. Tr. 8 through 293.
14. Tr. 297 through 341, 360 through 392.
15. Tr. 342 through 360, 392 through 401.
16. Tr. 407 through 439, 449 through 494.
17. Commission Exhibits 1 to 79, inclusive, with lettered series.
18. Tr. 513 through 579, 962 through 1148, 1150 through 1170.
19. Tr. 583 through 826, 856 through 909.
20. Tr. 828 through 854.
21. Tr. 943.

22. Respondent's Exhibits 5 to 26, inclusive.

23. Tr. 8 through 293, Commission's Exhibits 1 through 19, inclusive, Tr. 360, 977, 986.

24. Tr. 8 through 293, Commission's Exhibits 1 through 19, inclusive, Tr. 360, 977, 986.

25. Tr. 964 through 966.

26. National Nut Co. v. Kelling Nut Co., (D. C. Ill.) 61 F. Supp. 76, 82.

27. Tr. 79 through 84.

28. Tr. 556.

29. Tr. 1017, 1018.

30. Tr. 1017, 1018.

31. Package Closure Corporation v. Sealright Company, Inc., (1943) unreported (D. C. N. Y.), reversed in part and affirmed in part on appeal, 141 F. 2d 972, 979-980 (2nd Cir. 1944); Bruce's Juices, Inc., v. American Can Company, (1949) 87 F. Supp. 985 (D. C. Fla.), affirmed 187 F. 2d 919, 5th Cir., 1951, modified and petition for rehearing denied 190 F. 2d 73, 5th Cir. 1951, petition for certiorari dismissed on motion of petitioner 342 U. S. 875, 96 L. Ed. 64; McWhirter v. Monroe Calculating Machine Co., Inc., (1948) 76 F. Supp. 456 (D. C. Mo.); CCH Trade Reg. Serv. (9th Ed.), Court Decisions, 1941-1943, Par. 52, 969.

(Part 1, Page 110.)

32. Recommended conclusion of law.

33. Commission Exhibits 20 through 79, inclusive, with lettered series (charts only).

34. Commission Exhibits 20 through 79, inclusive, with lettered series (charts only).

35. Tr. 297, 303, 309, 321.

36. Tr. 297, 303.

37. Tr. 321, 773.

38. Tr. 309, 311.

39. Tr. 299.

40. Tr. 305.

41. Tr. 312.

42. Tr. 323.

43. Tr. 300, 312, 327, 738, 739, Commission's Exhibits 62, 79c.

44. Tr. 299, 306, 310, 322-328; Tr. 298, 755, 304, 308, 310, 322, 774-776.

45. Tr. 774-776.

46. Tr. 298, 755, 308, 310.

47. Tr. 334, 361, 373, 381, 387.

48. Tr. 361, 364, 365.

49. Tr. 337.

50. Tr. 364.

51. Tr. 376.

52. Tr. 384.

53. Tr. 390.

54. Tr. 335, 365, 377, 385.

55. Tr. 337, 364, 371, 375, 384, 389, 390.

56. Tr. 392-394.

57. Tr. 342-344.

58. Tr. 392-394; Tr. 342-344.

59. Notes 35 to 58, inclusive.

60. Unable to find this evidence in the entire record.

61. Note 10.

62. Tr. 367. Statement of Hearing Examiner; Tr. 987 through 996, 1012 through 1014.

63. Tr. 360, 977, 986.

64. Tr. 318, 319, 360, 977, 1020, 1030-1034, 1036-1040, 1041-1043, 1066; Respondent's Exhibits 22, 23, 24, 25, inclusive, with numerical and lettered series, Tr. 1099, 1104, 1105, 1109, 1112, 1157, 1158.

65. Tr. 1155.

66. Unable to find in this record any selling below cost or other monopolistic practice by respondent; unable to find any substantial evidence of diversion of trade from respondent's competitors caused by respondent's pricing practices.

(Part 1, Page 111.)

67. Unable to find in this record any evidence of a tendency toward monopoly in respondent; see Tr. 1155, 1025, 1026, 987-996.

68. Conclusion drawn from foregoing statements and notes 62 through 67.

69. Notes 34 through 60, inclusive.

70 and 71. FTC v. Morton Salt Co., 334 U. S. 37, 68 S. Ct. 822, 92 L. Ed. 1196.

Zlinkoff & Barnard, Basing Points and Quantity Discounts: The Supreme Court and a Competitive Economy, in 48 Columbia L. Rev. 984 Austin, Price Discrimination and Related Problems under the R-P Act, pp. 42, 43, 48. "Prima facie evidence is the minimum quantity necessary to raise a presumption of fact or is sufficient, if not rebutted, to establish the fact." In the matter of Pillsbury Mills, Inc., Docket No. 6000, decided by the FTC December 28, 1953.

72, 73, 74 and 75. Tr. 795-797, 739-752, 768-783, 763, 764, 943.

Unable to find in this record any evidence showing that respondent's larger discounts or rebates were reflected in resale prices, or that they influenced or affected resales of respondent's automotive products and supplies.

76 and 77. Unable to find in this record any reliable probative and substantial evidence of these effects.

78. This case falls far below the standards referred to in:

(1) the Speech of FTC Chairman Edward F. Howrey, entitled "Revaluation of Commission's Responsibilities", ABA Section of Antitrust Law, August 26-27, 1953;

(2) the recent cases of The Maico Company and Pillsbury Mills, Inc. decided by the FTC on December 7th and 28th, 1953, respectively; and

(3) the dissenting opinion of Mr. Justice Jackson in FTC v. Ruberoid Co., 343 U. S. 470, 480, 96 L. Ed. 1081, 1091 (1952). If the Commission and the Courts follow these standards, we submit that any other conclusion by the Hearing Examiner will not be upheld.

(Part 1, Page 112.)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of MOOG INDUSTRIES, INC., a corporation, formerly titled ST. LOUIS SPRING COMPANY, a corporation.	Docket No. 5723

PROPOSED FINDINGS, CONCLUSIONS AND PROPOSED ORDER BEFORE HEARING EXAMINER.

(Federal Trade Commission Received Jan 11 1954 Secretary.)

To: Hearing Examiner Earl J. Kolb:

Pursuant to Rule XXI of the Rules of Practice of the Federal Trade Commission, Eldon P. Schrup and Francis C. Mayer, attorneys supporting the complaint in the above-entitled proceeding, submit to the Hearing Examiner their proposed findings, conclusions and proposed order therein, together with the reasons therefor, as hereinafter set forth:

First Proposed Finding:

Respondent Moog Industries, Inc., formerly titled St. Louis Spring Company (hereinafter referred to as "Moog"), is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri, with selling and distributing subsidiaries known as the St. Louis Spring Suspension Service Company of Texas, Moog Industries, Inc., of Ten-

nessee, Moog Industries, Inc., of Colorado, and St. Louis Spring Suspension Service Company of Nebraska.

Moog is now, and for several years last past has been, engaged in the business of the manufacture, sale and distribution of automotive products and supplies, principally coil action parts, leaf springs, coil springs, chassis parts, piston rings and other related items. Said products and supplies are sold by the respondent for use, consumption, or resale within the United States and the District of Columbia, to different purchasers of the same therein located, and respondent causes said products and supplies, so sold, to be shipped to the purchasers thereof located in states other than the state or states wherein said shipment or transportation originated. (Part 1, Page 114)

Moog maintains, and at all times mentioned herein had maintained, a course of trade in commerce in said products and supplies among and between the states of the United States and in the District of Columbia.

Moog, in the course and conduct of its business, as aforesaid, is now and since June, 1936, has been, engaged in active and substantial competition with other corporations, partnerships, firms and individuals manufacturing, selling and distributing comparable automotive products and supplies in commerce to purchasers of the same in manner and method and for the purposes as aforesaid. Many of said purchasers and many of the aforesaid purchasers from Moog are competitively engaged each with the other.[1]

Second Proposed Finding:

Moog, in the aforesaid course and conduct of its business, has been and is now marketing its above products of like grade and quality under its own brand name of Moog, throughout the forty-eight states, with the aid of twenty-five branches and warehouses maintained in principal cities.[2] In offering its products for sale, Moog classi-

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[1]Page 1 of amended answer; Tr. 6-8; Tr. 120-126; Tr. 195-198; Tr. 1051-1070.

[2]CX 16; Tr. 119, amended answer.

fies said products generally into three lines: leaf spring line, including coil springs and chassis parts; coil action line; and the piston ring line.[1] At all times since 1936, Moog has offered and sold a leaf spring line and a piston ring line to its purchasers, adding the coil action line in 1939, which was supplemented by major additions in 1946.[2]

During the year 1949, Moog sold to approximately 1,200 coil action accounts, 800 leaf spring and chassis parts accounts, and 400 piston ring accounts.[3] In relation to the total sales of Moog, the leaf spring line and coil action line have always predominated, with the piston ring line accounting for a rather small portion of the total overall sales.[4] (Part 1, Page 115)

Third Proposed Finding:

During the year 1949, Moog distributed its products on the basis of contracts with its distributors and other customers hereinafter described, mainly according to the prices shown on the applicable Distributors Net Cost Sheet.[5]

As shown by the exhibits of record, a retroactive merchandise bonus was paid to the purchasers of coil action parts as follows:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$15,000 to $17,499	14%
$ 1,000 to $ 4,999	5%	17,500 to 19,999	15%
5,000 to 7,499	7½%	20,000 to 22,499	16%
7,500 to 9,999	9%	22,500 to 24,999	17%
10,000 to 12,499	10%	25,000 to 27,499	18%
12,500 to 14,999	12%	27,500 and over	19%

On the piston ring line, a merchandise bonus was paid to the purchasers of piston rings on the following basis:

[1]CX 1; Tr. 120-124.

[2]Tr. 83; Tr. 120-124; Tr. 963; Tr. 1058-59.

[3]Tr. 239.

[4]Tr. 125; Tr. 1169.

[5]CX 4A and B; CX 6; CX 15.

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $2,000	None	$ 9,000 to $ 9,999	13%
$2,000 to 2,999	2%	10,000 to 11,999	14%
3,000 to 3,999	5%	12,000 to 14,999	15%
4,000 to 4,999	7%	15,000 to 17,999	16%
5,000 to 5,999	9%	18,000 to 20,999	17%
6,000 to 6,999	10%	21,000 to 24,999	18%
7,000 to 7,999	11%	25,000 to 29,999	19%
8,000 to 8,999	12%	30,000 and over	20%

Beginning July 1, 1949, Moog introduced a retroactive merchandise bonus plan applicable to the leaf spring line, including coil springs and chassis parts, which was paid on the following basis:

Net Purchases During Each Fiscal Year	Retroactive Bonus	Net Purchases During Each Fiscal Year	Retroactive Bonus
Under $2,000	None	$ 8,000 to $ 9,999	8%
$2,000 to $2,999	3%	10,000 to 14,999	9%
3,000 to 3,999	4%	15,000 to 19,999	10%
4,000 to 4,999	5%	20,000 to 27,499	11%
5,000 to 5,999	6%	27,500 to 34,999	12%
6,000 to 7,999	7%	35,000 and over	13%

(Part 1, Page 116.)

Prior to July 1, 1949, Moog granted to some leaf spring group and other accounts a discount not offered or granted to its leaf spring accounts generally. These accounts and the amounts of discounts were:

Cotton States, Inc.	Greenwood, Miss.	5%
Ozburn, Crow & Yantis Co.	Memphis, Tenn.	8%
Mid-South Distributors	Memphis, Tenn.	5%
Henderson Rim & Wheel Co.	Salt Lake City, Utah	5 and 10%.[1]

Under the above rebate plans purchasers were granted and received rebates by virtue of a retroactive method, thereby receiving on all their individual purchases the rebate according to the rebate bracket applicable to their total annual purchases. Any individual purchase price is retro-

[1]Tr. 205; Tr. 238; Tr. 242; Tr. 249-250.

actively determined by all subsequent purchases according to the terms of the retroactive rebate plan which is totally unrelated to the size or number of the individual purchase. Thus, purchasers buying in identical quantities and dollar amounts at the same time may actually pay different prices for the same merchandise, since such prices are determined by the prior or subsequent purchases made by such purchasers within any given contract year.

Illustrative of the actual net differences in purchase prices paid by Moog purchasers for such merchandise due to the granting by Moog and the receipt by such purchasers of the foregoing rebates and discounts are the exhibits of record, showing tabulations of sales in certain localities.[1] Such exhibits reflect differences in net buying prices in varying amounts and percentages, with some differences amounting to as much as 19%.[2]

The amounts involved in the granting by Moog of the merchandise bonus are substantial and reflect the importance which is attached to said rebates by the various purchasers. Rebates were granted by Moog and received by some but not all the purchasers of the coil action line for the following years in the following amounts:[3]

1947	$ 163,392.66
1948	203,478.53
1949	106,255.91

(Part 1, page 117.)

Rebates were also granted by Moog and received by some but not all the purchasers of the piston ring line for the following years in the following amounts:[4]

1947	$ 57,561.89
1948	21,011.19
1949	22,380.88

[1]CX 61, 62, 63, 64, 65, 66, 67 and 68; CX 79.

[2]CX 68.

[3]CX 44A, 45A and 46A.

[4]CX 50A, 51A and 52A.

Rebates were likewise granted by Moog and received by some but not all purchasers on purchases of the leaf spring line in the year 1950 in the amount of $81,300.00.[1] Particularly significant, in analyzing the various rebate plans of Moog, are the figures appearing on Commission's Exhibit 69, a copy of which is attached hereto.

(Part 1, Page 118.)

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[1]CX 70A and B 71, B and C, 72, 73, 74, 75, 76, 77. Note: This represents only a portion of the purchasers receiving rebates on purchases of this line.

Summary by Discount Brackets of No. of Customers and Average Annual Coil Action Purchases — 1947, 1948 and 1949:

Net Purchases	Rebate	1947 No. of Customers	1947 Average Annual Purchases	1948 No. of Customers	1948 Average Annual Purchases	1949 No. of Customers	1949 Average Annual Purchases
Under $1,000	None		$		$		$
$ 1,000 to 4,999	5%	369	2,238	425	2,143	352	1.911
5,000 to 7,499	7½%	38	6,235	59	5,895	27	5,499
7,500 to 9,999	9	22	8,279	26	7,705	4	8,372
10,000 to 12,499	10	8	11,031	8	8,770	6	10,660
12,500 to 14,999	12	5	13,676	10	11,945	4	13,667
15,000 to 17,499	14	2	16,237	2	13,715	5	9,277
17,500 to 19,999	15	3	18,966	5	15,138	2	18,735
20,000 to 22,499	16	1	20,940	0	—	0	—
22,500 to 24,999	17	1	22,734	1	22,987	1	23,444
25,000 to 27,499	18	0	—	0	—	1	26,887
27,500 and over	19	7	38,488	11	36,065	5	33,471

(Part 1, Page 119)

This exhibit shows that in 1947, 466 purchasers participated in the rebate plan on coil action line sales; in 1948, 557 purchasers participated; and in 1949, 407 purchasers participated in the rebate plan. In none of the years selected did as many as half of the purchasers from Moog receive a rebate on their purchases, and for the most part, only approximately one-third of the purchasers from Moog were favored with the lower prices resulting from the granting of said rebates. This graphically demonstrates the inequities arising from the annual volume rebate plan based solely upon total yearly purchases and which completely ignores the size and quantity of individual purchases. The record in this case does not demonstrate that the purchasers receiving such rebates, purchased in single transactions in as large or larger amounts than that great majority of purchasers who did not participate in the rebate plan.

Fourth Proposed Finding:

Moog, in the course and conduct of its business, has been and is now marketing its above products of like grade and quality through its Moog distributors and through its other customers—The Moog Chassis Parts Wholesaler; The Moog Parts Jobber; and The Moog Associate Ring Jobber.[1]

The Moog Chassis Parts Wholesaler purchases Moog suspension parts under the terms of the Moog Chassis Parts Wholesaler Agreement and according to the prices shown on the Chassis Parts Wholesalers Net Cost Sheet.[2] The Agreement, prepared and distributed by Moog, provides for the maintenance of a certain minimum of stock of Moog parts. Each Moog Chassis Parts Wholesaler Agreement specifically provides for the signature of the Chassis Parts Wholesaler, the signature of the Moog distributor, and the acceptance signature of Moog. The prices appearing on the Chassis Parts Wholesaler's net cost price sheet are substantially higher than those appearing on the Moog Distributors Net Cost Sheet.[3]

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[1]CX 10, 11, 12, 13; Tr. 182-6.

[2]CX 10 and 15.

[3]CX 15.

The Moog Parts Jobber purchases Moog parts under the terms of the Moog Parts Jobber agreement and according to prices shown on the Moog Confidential Net Cost Sheet.[1] The Agreement, prepared (Part 1, Page 120) and distributed by Moog, provides for the maintenance of certain minimum stocks of Moog parts. Each Moog Parts Jobber Agreement specifically provides for the signature of the Moog jobber, the signature of the Moog distributor, and the acceptance signature of Moog.

The Moog Associated Ring Jobber purchases Moog piston rings under the terms of the Moog Associated Ring Jobber Contract and according to prices shown on the Moog Associated Ring Jobbers Net Cost Sheet.[2] The contract, prepared and distributed by Moog provides for the maintenance of a certain minimum inventory of Moog piston rings. Each Moog Associated Ring Jobber Contract specifically provides for the signature of the Moog jobber, the signature of the Moog distributor and the acceptance signature of Moog.

Moog publishes and causes to be circulated to the above three classifications of accounts, the catalog material and pertinent price lists, including resale price lists. Moog representatives call upon all of the above accounts as a regular part of their duties for the purpose of inspecting stocks and drawing up orders for submission to Moog.[3] The degree of control exercised by Moog over sales to the Moog Chassis Parts Wholesaler, the Moog Parts Jobber and the Moog Associated Ring Jobber was such that said sales were in all essential respects sales by Moog. These indirect accounts are, therefore, "purchasers" from Moog within the meaning of the Clayton Act, as amended.[4]

(Part 1, Page 121)

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[1]CX 11, 12 and 15.

[2]CX 13, 15.

[3]Tr. 182-6.

[4]See Docket No. 3977, In the Matter of Champion Spark Plug Co., Findings as to the Facts and Conclusions, Paragraph Nine, decided by the Commission July 10, 1953. See also on such point, In the Matter of Kraft Phoenix Cheese Corp., (1937) 2 FTC 537, 546; In the Matter of Luxow Ltd., (1940) 31 FTC 658; In the Matter of Dentists Supply Co., (1943) 37 FTC 345; Carter Carburetor v. FTC, (1940) 112 F. 2d 722, 731 (C. C. A. 8); Elizabeth Arden v. FTC, (1946) 156 F. 2d 132, 135 (C. C. A. 2).

Fifth Proposed Finding:

MOOG BUYING-GROUP JOBBERS.

Customers so classified purchase Moog products on the basis of the merchandise prices appearing on the current Moog Distributors' Net Cost Sheet. The purchasing procedure in a group-buying operation provides for the forwarding by the individual jobber-member to the seller directly or through the group office of the individual jobber's particular purchase requirement. Merchandise so ordered is shipped by the seller direct to the individual jobber-member with billing for the same being directed to the group office. Monthly settlements are made between the seller and the group office for the aggregate purchase orders of all the jobber-members so received and each jobber-member also settles monthly with the group office for its own individual purchases so made.

Such rebates, discounts and allowances as are collected from the seller by the group office on the aggregate purchases thus made are distributed by the group office to each individual jobber-purchaser in proportion to the amount of such jobber's individual purchases so made.[1]

Illustrative of the monetary benefits derived by the individual jobber-member of such group-buying organizations, as opposed to those individual purchasers buying without the benefits of such group consolidation of purchases, is the following tabulations:[2]

See Attached Tabulation.

(Part 1, Page 122)

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[1]Tr. 52-57; Tr. 299; Tr. 349; 351; Tr. 604; Tr. 704-706; Tr. 863-865.

[2]The figures showing actual net purchases of each jobber-member and the actual amount of discount paid were taken from CX 21 V and CX 21 W.

Automotive Jobber "Group-Buying" Method of Purchasing

	-1-	-2-	-3-	-4-	-5-	-6-
Manufacturer's Published Discount Schedule to Trade						
Net Purchases	**Retroactive Rebate**	**Actual Net Purchases Each Member Jobber**	**Mfr's Schedule Discount Rate Applicable**	**Mfr's Schedule Discount Amount Due**	**Mfr's "Group" Discount Rate**	**Mfr's "Group" Discount Amount Paid**	**Actual Price Difference**
		1. $ 1,369.08	5%	$ 68.45	19%	$ 260.13	$ 191.68
		2. 2,408.24	5%	120.41	19%	457.57	337.16
Under $1,000	None	3. 1,530.00	5%	76.50	19%	290.70	214.20
$ 1,000-$4,999	5%	4. 585.96	None	—	19%	111.33	111.33
5,000- 7,499	7½%	5. 2,594.97	5%	129.75	19%	493.05	363.30
7,500- 9,999	9%	6. 1,483.65	5%	74.18	19%	281.89	207.71
10,000-12,499	10%	7. 3,728.45	5%	186.42	19%	708.41	521.99
12,500-14,999	12%	8. 6,656.06	7½%	609.20	19%	1,264.65	655.45
15,000-17,499	14%	9. 2,759.69	5%	137.98	19%	524.34	386.36
17,500-19,999	15%	10. 3,440.61	5%	172.03	19%	633.72	481.69
20,000-22,499	16%	11. 1,492.70	5%	74.64	19%	283.61	208.97
22,500-24,999	17%	12. 750.92	None	—	19%	142.67	142.67
25,000-27,499	18%	13. 3,610.53	5%	180.53	19%	686.00	505.47
27,500 and over	19%	14. 1,072.02	5%	53.60	19%	203.68	150.08
	Totals	$33,482.88		$1,883.69		$6,361.75	$4,478.06

(Part 1, Page 123)

During the sample year 1949, Moog products were sold to various members of different group-buying organizations entering into the Moog distributors' franchise agreement. Sales were made during 1949 to members of the following group-buying organizations:

Name	Address
Ark-La-Tex Warehouse Distributors, Inc.	Marshall, Texas
Associated Parts Company	Somerville, Mass.
Automotive Jobbers, Inc.	Cleveland, Ohio
Automotive Parts Distributors, Inc.	Athens, Ga.
Automotive Southwest, Inc.	Dallas, Texas
Cotton States, Inc.	Greenwood, Miss.
Metropolitan Automotive Wholesalers	New York, N. Y.
Mid-South Distributors, Inc.	Memphis, Tenn.
Mid-West Warehouse Distributors	Kansas City, Mo.
Ozburn, Crow & Yantis Co.	Memphis, Tenn.
Six-States Associates	Boston, Mass.
Southern California Jobbers, Inc.	Los Angeles, Calif.
Southwest Automotive Distributors,	Los Angeles, Calif.
Southwestern Warehouse Distributors	Dallas, Texas
Warehouse Distributors, Inc.	Chattanooga, Tenn.

Through the above group-buying organizations Moog offered its rebate plan on such a basis to 566 jobber-members of such organizations and approximately 90% of the said jobber-members received rebates in accordance with rebates paid the group-buying organizations on their total purchases.[1]

The rebates and discounts, as shown by the tabulations in evidence, were granted and allowed by Moog on the purchases of each individual member of the said buying-groups irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of the Moog merchandising bonus schedules set forth in the Moog distributors' franchise agreement.[2]

It is clear from the foregoing and the testimony and exhibits of record in this proceeding that a group-buying or-

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[1]CX 39-A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X; CX 71A and B.

[2]CX 70A and B; CX 71A, B and C; CX 72, 73, 74, 75, 76 and 77.

ganization is in reality but a bookkeeping device for the collection and distribution of rebates, discounts and allowances received from sellers on the purchases made by its jobber-members. Jobber-members of a group-buying organization so purchasing merchandise from Moog are, therefore, "purchasers" from Moog within the meaning of the Clayton Act, as amended.[1]

(Part 1, Page 124.)

Sixth Proposed Finding:

Moog Automotive products and supplies sold and distributed in the manner as afore-described, are commodities of like grade and quality.[2]

Purchasers of automotive products and supplies located in the same city or town and purchasing Moog merchandise for resale are competitively engaged each with the other in such trade areas.[3] The trade area in which such purchasers are competitively engaged in the resale of Moog merchandise is usually not restricted to the city or town of their mutual location, but may and variously does further extend beyond such limits and into the sales territories of other purchasers also purchasing such merchandise for competitive resale.[4] Thus, Moog Distributors, Moog Chassis Parts Wholesalers, Moog Parts Jobbers and Moog Associated Ring Jobbers are competitively engaged each with the other when some or all resell such merchandise in their respective mutual sales territories.

Seventh Proposed Finding:

The net purchase price paid by purchasers for resale of Moog merchandise is the purchase price paid subject

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[1]Tr. 52-57; Tr. 297; Tr. 302; Tr. 335.

[2]CX 15.

[3]Tr. 299, 301, 306, 310, 322, 337, 363, 370, 375, 384 and 390.

[4]For example, Tr. 297 and 298 (4 salesmen covering New Orleans, and a hundred mile radius); Tr. 309 and 310 (3 salesmen, all of La. and part of Miss.); Tr. 602 (10 salesmen, all of Colorado and Southern Wyoming and Western Kansas). See also Tr. 297, 310, 336, 342, 364, 375, 383, 389, 602 and 725.

to and following all applicable rebates, discounts and allowances.[1] In the observance of the seller's suggested resale price the favorable competitive effect following a lower net purchase price as opposed to a higher net purchase price with relation to the higher profit margin thereby gained by a purchaser for resale, is self-evident.[2] Similarly, in the non-observance of the seller's suggested resale price the ability of the purchaser for resale to offer for sale and sell at a lower price with a higher profit margin resulting from a lower net purchase price as opposed to a higher net purchase price, is obvious.[3]

The importance of the net purchase price difference attributable to the volume rebate schedules contained in the Moog Distributors Franchise in its application to purchases of automotive products and supplies made thereunder is universally recognized by those purchasers who seek to purchase and do purchase the same through the use of a group-buying organizational device.[4] Moog, through recognition of such group-buying organizational device, also secured new and additional customers not previously purchasing Moog products. Each buying group, in order to attain the maximum rebate bracket, actively promotes the

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[1]CX 57.

[2]"Price competition is but one form of competition. Additional service to customers, additional salesmen to call on them, carrying a larger and more varied stock, branch houses, proximity to customers—all aid respondent's customers to stay in business and to prosper. The institution or expansion of these competitive aids depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise purchased." See Para. Eleven, Initial decision of Hearing Examiner, Docket No. 5771, In the Matter of Namsco, Inc., adopted by the Commission as of March 17, 1953 (Part 1, Page 125).

[3]See "III. Discounts to purchasers of by-products" opinion of United States Supreme Court, Corn Products Refining Company v. F.T.C. (1945) 324 U. S. 726.

[4]CX 58A and B 59, 25-Z-14, 24-O, 24-P; Tr. 709-710 and 865. See also Tr. 860 where, in response to the question as to why the jobber-witness joined a buying group, the following answer was made: "By buying through the group we would get a better price."

Moog line of products as opposed to competitive lines not made available under the group purchasing arrangement.[1]

The record, based on the tabulations in evidence in this proceeding, discloses substantial differences in net purchase prices paid by competing purchasers of Moog merchandise for resale far exceeding in amount a sum represented by the 2% cash discount extended and taken by these purchasers on such purchases. The substantiality of the amount represented by such price differences with relation to the purchasers' net profit margin is conclusively shown when compared with the competitive effect of the amount represented by the 2% cash discount always taken on such purchases, when available.[2]

(Part 1, Page 126.)

Eighth Proposed Finding:

The numerous prohibited discriminatory price differentials granted by Moog and received by the purchasers from Moog, as set forth on the various tabulations in evidence in this proceeding, are not such differentials as make only due allowances for differences in the cost of manufacture, sale or delivery by Moog resulting from differing methods or quantities in which such commodities were sold or delivered to such favored purchasers.

The record in this matter is barren, not only of any adequate showing of a cost-justification, but of any attempt by Moog to show a cost justification for any of its aforesaid prohibited price differentials.[3]

Reference must again be made to the fact that involved in this proceeding is a retroactive volume rebate granted on the sole basis of total purchases, which ignores entirely

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[1]CX 20-O, 25-Z-7, 25-Z-14; Tr. 605, 710. See also CX 27-R, which states; "Its purpose is to offer to manufacturers its business as nearly 100% as possible." See also Docket No. 3840. In the Matter of Simmons Co., 29 FTC 727, 743-44, 746.

[2]CX 57; 314-15, 323-24, 398-401, 771. Particular reference in such connection is made to the following cases: Docket No. 3200, H. C. Brill Co., Inc., 26 FTC 666, 677-81, and FTC v. Morton Salt Company, 334 U. S. 37.

[3]See H. C. Brill Co., Inc., supra, 26 FTC 666, 679-680.

the costs attendant to individual purchases and their size and number.

Ninth Proposed Finding:

The numerous prohibited discriminatory price differentials granted by Moog and received by the purchasers from Moog, as set forth on the various tabulations in evidence in this proceeding, were not made in good faith to meet the equally low, lawful price of a competitor.[1]

Pertinent to any attempted defense by Moog in such regard would be the corresponding prices and discount structures of its competitors for an identical time period. Moog has made no attempt to and has not related any of its competitors' prices and discount structures to its own discriminatory prices and discount structures for such a time period sufficient to meet any test of probative value.[2]

The testimony and exhibits in evidence relating to its competitors' pricing practices, as presented by Moog in this proceeding, fail to show that Moog in any instance granted its aforesaid discriminatory prices to each favored purchaser to meet in good faith the equally low, lawful price of a competitor in order to retain such purchaser as a customer.[3]

(Part 1, Page 127.)

Moog's further claim that its prohibited discriminatory prices to its customers were necessitated by the low replacement part prices given by vehicle manufacturers to their customers, while not relevant to any defense in this proceeding, is negatived by the documentary evidence presented in such connection. In each of the three examples selected by Moog the net price from the vehicle manufacturer to its car dealer is substantially higher than the net price for a comparable part sold by Moog to its purchasers. The difference in the price in favor of the Moog purchaser is even more substantial when a volume

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[1]See Standard Oil Co. v. FTC, (1951) 340 U. S. 231; Also FTC v. A. E. Staley Manufacturing Co., (1945) 324 U. S. 746.

[2]RX 6A-D, 13, 22, 24, 25A-D; Tr. 1119-43.

[3]Tr. 1130.

rebate is granted by Moog, thus further lowering the net price to the purchaser from Moog.[1]

CONCLUSIONS.

1. Moog products purchased for resale are of like grade and quality.

2. Moog's different rebates, discounts and allowances on purchase price results in a substantially higher price being paid by some than other competing purchasers of said products for resale.

3. Moog's prohibited discriminatory price, when reflected in the resale price of said products, enables the favored purchaser to attract business away from the non-favored purchaser, or force the non-favored purchaser to resell at a substantially reduced profit. In the observance of a suggested resale price, the above prohibited discriminatory price enables the favored purchaser to resell said products at a substantially higher profit margin than that obtainable by the non-favored purchaser in such resale.[2]

4. Competitive purchasers from Moog of the foregoing products for resale in their respective mutual sales territories are the following:

(a) Moog Distributors;

(b) Moog "Group-Buying" Jobbers;

(c) Moog Chassis Parts wholesalers;

(d) Moog Parts Jobbers; and

(e) Moog Associate Ring Jobbers.[3]
(Part 1, Page 128.)

5. The higher net purchase prices paid by the non-favored purchasers of said products are such as may tend

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[1]T 1088-90; T. 1122-25.

[2]Section 2(a) is violated whether or not the seller's lower discriminatory price is reflected in the purchaser's resale price. See Corn Products Refining Co. v. F.T.C., 324 U. S. 726.

[3]See F.T.C. v. Ruberoid Co., (1952) 343 U. S. 470, at 475, with reference to the above descriptive terminology as applied by the seller to "purchasers who in fact compete."

to and do injure, destroy and prevent competition between Moog and its seller competitors,[1] and between the said favored and non-favored purchasers competitive in their respective mutual sales territories.[2]

(Part 1, Page 129.)

PROPOSED ORDER.[3]

It Is Ordered that respondent Moog Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

A. Discriminating, directly or indirectly, in the price of said automotive products and supplies of like grade and quality:

1. By selling, in competition with others said products to any purchaser at net prices higher than the net price charged any other purchaser reselling at the same level of distribution as the purchaser paying the higher price;

2. By selling to any direct purchaser at net prices higher than the net prices charged any other direct purchaser who, in fact, competes in the resale and distribution of said products with the purchaser paying the higher price.

3. By selling to any indirect purchaser at net prices higher than the net prices charged any other direct

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[1]See Footnote 3, page 11.

[2]See Footnote 4, page 11.

[3]See O. C. D. in Docket No. 6042, In the Matter of American Biltrite Rubber Company, Inc., issued by the Commission March 9, 1953; and O. C. D. in Docket No. 3977, In the Matter of Champion Spark Plug Company, issued by the Commission July 10, 1953. See also F.T.C. v. Ruberoid Co., supra, to the effect that the order need not be limited in its prohibitions to the specific price differentials shown to have been adopted in past violations of the statute (Part 1, Page 130).

or indirect purchaser who, in fact, competes in the resale and distribution of said products with the purchaser paying the higher price.

Wherefore, it is requested that the Hearing Examiner find that the respondent's above-described acts and practices are in violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (U. S. C., Title 15, Sec. 13), and that the above proposed order to cease and desist be herein entered.

Respectfully submitted,

/s/ Eldon P. Schrup
/s/ Francis C. Mayer
Counsel Supporting the Complaint.

January 8, 1954.
(Part 1, Page 131.)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of MOOG INDUSTRIES, INC., a corporation, formerly titled ST. LOUIS SPRING COMPANY, a corporation.	Docket No. 5723

ORDER DISPOSING OF PROPOSED FINDINGS AND CONCLUSIONS:

(Federal Trade Commission Received Mar 8 1954
Recording Secretary.)

This matter is before the Hearing Examiner for disposition of proposed findings of fact and conclusions which were filed by counsel supporting the complaint and counsel for the respondent. The Hearing Examiner has given consideration to the various proposed findings and conclusions submitted by counsel and the record herein and has made the following rulings with reference to such proposed findings and conclusions:

I.

Proposed Findings and Conclusions Filed by Counsel in Support of the Complaint.

Proposed Findings 1-2. Adopted in substance.

Proposed Finding 3. Adopted in substance, except as to discounts prior to July 1, 1949, to certain group buyers which is not material.

Proposed Finding 4. Refused as not material.

Proposed Finding 5. Adopted in substance.

Proposed Finding 6. Adopted to the extent that products are of like grade and quality and that purchasers for resale are in competition in their respective trading areas. (Part 1, Page 135.)

Proposed Findings 7-9. Adopted in substance.

Proposed Conclusions 1-3 and 5. These conclusions have been adopted in substance, either in the conclusions to the Initial Decision or have been covered by the Initial Decision itself.

Proposed Conclusion 4. Refused.

II.

Proposed Findings and Conclusions Submitted by Counsel for Respondent.

The proposed findings submitted by respondent have not been presented in such a manner as to permit a ruling on specific proposed findings. The findings proposed with reference to organization of respondent, its method of doing business and its pricing practices, and proposed findings as to absence of proof of primary line injury to competition have been adopted in substance. Proposed findings that respondent's business is not substantial; that evidence does not show respondent's customers are competitively engaged; that interchangeability should be the controlling test of like grade and quality; and that no injury to competition has been shown, have been refused for reasons more fully set out in the Initial Decision. The remaining proposed findings are refused as not material, not essential

to the Initial Decision or constituting conclusions and argument rather than findings of fact.

The document submitted by the respondent as proposed findings has been duly considered by the Hearing Examiner, all matters raised therein have been fully covered in detail in the Initial Decision filed in this proceeding.

/s/ Earl J. Kolb
Hearing Examiner.

March 5, 1954.

Mailed Mar 24 1954 Legal

INITIAL DECISION

By Earl J. Kolb Hearing Examiner

(Federal Trade Commission Received Mar 8 1954
Records Serv. Secretary AAP)

This proceeding is before the undersigned Hearing Examiner for final consideration on the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel.

1. The complaint in this proceeding charges that the respondent Moog Industries, Inc., has discriminated in price between different purchasers of its products in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C., Title 15, Section 13).

2. The price differentials which are charged to be in violation of the Clayton Act arise from respondent's pricing practices, involving the granting of an annual retroactive volume rebate to its customers and also in the granting of such retroactive volume rebate to group purchasers on the basis of their aggregate purchases instead of upon the individual purchases of the members.

3. The general system of pricing used by the respondent, as developed by the record, and the variations therefrom in the case of group buyers, is not disputed by the respondent but was instead defended on the basis that the

merchandise sold by the respondent to its various

(Part 1, Page 137) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

customers was not of like grade and quality; that the pricing practices of respondent has not resulted in any injury to competition; and that respondent's prices, discounts and allowances were made to meet competition. No attempt was made by respondent to justify its price differentials on the basis of differences in cost of manufacture, sale or delivery. Evidence as to primary line injury to competition between respondent and its competitors is not sufficient to warrant any finding, and consideration of this matter must be limited to secondary line injury to competing customers of the respondent.

4. Respondent Moog Industries, Inc., is a Missouri corporation with its principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri, with selling and distributing subsidiaries known as the St. Louis Spring Suspension Service Company of Texas, Moog Industries, Inc., of Tennessee, Moog Industries, Inc., of Colorado, and St. Louis Spring Suspension Service Company of Nebraska.

5. Since June, 1936, the respondent has been engaged in the manufacture and in the sale and distribution in interstate commerce of automotive replacement parts, consisting of coil action parts, leaf springs, coil springs, chassis parts, piston rings and other related items in competition with other concerns who were also engaged in the sale and distribution of similar products in interstate commerce.

6. The market in automotive replacement parts is highly competitive. The amount of business transacted by the respondent in the replacement parts field is substantial. In an advertising circular distributed by respondent to its customers in 1949, it was stated "The company with a small beginning back in 1919, has become one of the country's large industries and recently consolidated its manufacturing divisions: St. Louis Spring Co., Moog Coil Action Parts Co., and Moog Piston Ring Company, into

Moog Industries, Inc." The respondent sells its products in every state of the United States and in 1950 maintained 25 branches and warehouses in the principal cities.

7. The respondent, during the times mentioned herein, has sold its replacement parts to jobbers, who were designated by the respondent as distributors, who

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resold such products to garages, service stations, fleet owners and to other jobbers. The respondent separated the products into three classifications (a) leaf spring line, which consists of leaf springs, coil springs, tie rod ends, shackles and kingbolts; (b) Coil action line, which consists of front wheel spring assembly parts exclusive of coil springs; and (c) piston ring line. A portion of the replacement parts in each of these lines was sold in the form of kits or packages containing complete unit installations for various makes of cars. From time to time respondent issued its distributor's price list on each of these lines which listed the basic prices used by the respondent in the sale and distribution of its various replacement parts. Any discounts, allowances or rebates were off said distributor's price list. Respondent also from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products. During the year 1949, respondent sold approximately 1,200 coil action accounts, 800 leaf spring and chassis parts accounts, and 400 piston ring accounts. In relation to total sales, the leaf spring line and coil action line have always predominated with the piston ring line accounting for a small proportion of the total overall sales.

8. The net purchase price paid by distributors for respondent's products is the purchase price paid subject to and following all applicable rebates, discounts and allowances. The automotive replacement parts sold and distributed by respondent were all of one grade and quality. Respondent sold such products of like grade and quality to its distributors at varying net prices. Such distributors of respondent were competitively engaged in the resale of

respondent's replacement parts in the various territories and places where such distributors carried on their businesses.

9. The annual volume rebates, provided for in respondent's pricing plan, were incorporated in, and made a part of, its distributor franchise agreement. The volume rebate on the coil action line and the piston ring line has been a retroactive volume rebate in substantially the same amount since 1947. Prior to July 1, 1949, respondent allowed a non retroactive rebate on its leaf spring line, but subsequent thereto has granted a retroactive volume rebate. The retroactive volume rebates as set out in respondent's franchise agreements with its distributors are as follows:

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Coil Action Parts:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$15,000 to $17,499	14%
$ 1,000 to $4,999	5%	17,500 to 19,999	15%
5,000 to 7,499	7½%	20,000 to 22,499	16%
7,500 to 9,999	9%	22,500 to 24,999	17%
10,000 to 12,499	10%	25,000 to 27,499	18%
12,500 to 14,999	12%	27,500 and over	19%

Piston Ring Line:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $2,000	None	$ 9,000 to $ 9,999	13%
$2,000 to 2,999	2%	10,000 to 11,999	14%
3,000 to 3,999	5%	12,000 to 14,999	15%
4,000 to 4,999	7%	15,000 to 17,999	16%
5,000 to 5,999	9%	18,000 to 20,999	17%
6,000 to 6,999	10%	21,000 to 24,999	18%
7,000 to 7,999	11%	25,000 to 29,999	19%
8,000 to 8,999	12%	30,000 and over	20%

Leaf Spring Line, Including Coil Springs and Chassis Parts:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$11,000 to $14,999	11%
$1,000 to 2,999	5%	15,000 to 19,999	12%
3,000 to 4,999	7%	20,000 to 27,499	13%
5,000 to 7,999	9%	27,500 to 34,999	14%
8,000 to 10,000	10%	35,000 and over	15%

In addition to the above volume rebate, the respondent allowed a 10 percent warehousing and redistributing commission to distributors who resold respondent's products to other jobbers who had been approved by the respondent, provided the combined earnings of the warehousing and redistributing commission and the volume rebate on any line cannot exceed the earnings figured at the maximum rebate for that line. The retroactive volume rebate was paid by respondent on all purchases of the distributor

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including merchandise resold by the distributor to other jobbers.

10. Under the retroactive rebate plan, purchasers were granted and received rebates on all their individual purchases according to the rebate bracket applicable to their total annual purchases. Any individual purchase price was retroactively determined by the total of all purchases during the year according to the terms of the retroactive rebate plan.

11. The amounts involved in the granting by respondent of the volume rebates were substantial and reflect the importance which was attached to said rebates by the various purchasers. Rebates were granted by respondent and received by some, but not all, the purchasers of the coil action line for the following years in the following amounts:

1947	$163,392.66
1948	203,478.53
1949	106,255.91

Rebates were also granted by respondent and received by some, but not all, the purchasers of the piston ring line for the following years in the following amounts:

1947	$ 57,561.89
1948	21,011.19
1949	22,380.88

Rebates were likewise granted by respondent and received by some, but not all, purchasers on purchases of the leaf spring line in the year 1950 in the amount of $81,300.

12. During the year 1949, respondent sold its products to jobber members of various group buying organizations, entering into the Moog distributor's franchise agreement. Sales were made during 1949 to members of the following group buying organizations:

Name	Address
Ark-La-Tex Warehouse Distributors, Inc.	Marshall, Texas
Associated Parts Company	Somerville, Mass.
Automotive Jobbers, Inc.	Cleveland, Ohio
Automotive Parts Distributors, Inc.	Athens, Ga.
Automotive Southwest, Inc.	Dallas, Texas

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Cotton States, Inc.	Greenwood, Miss.
Metropolitan Automotive Wholesalers	New York, N. Y.
Mid-South Distributors, Inc.	Memphis, Tenn.
Mid-West Warehouse Distributors	Kansas City, Mo.
Ozburn-Crow & Yantis Co.	Memphis, Tenn.
Six-States Associates	Boston, Mass.
Southern California Jobbers, Inc.	Los Angeles, Calif.
Southwest Automotive Distributors	Los Angeles, Calif.
Southwestern Warehouse Distributors	Dallas, Texas
Warehouse Distributors, Inc.	Chattanooga, Tenn.

13. The purchase procedure in a group buying operation provided for the forwarding of purchase orders by the

individual jobber member to the seller directly or through the group office. Merchandise so ordered was shipped by the respondent direct to the individual jobber member with billing for same being directed to the group office. Monthly settlements were made between respondent and the group office for the aggregate purchase orders of all the jobber members so received and each jobber member also settles monthly with the group office for his own individual purchases so made. The annual volume rebate allowed by the respondent was based upon the aggregate purchases of the group members and was paid to the group office, which in turn distributed such volume rebate to the jobber members in proportion to the amount of such jobber's individual purchases. The rebates and discounts, as shown by tabulations in evidence, were granted and allowed by respondent to each individual member of the said buying groups on the basis of the total purchases of all the members irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of respondent's volume rebate schedules set forth in the respondent's distributors' franchise greement. The group buying organization was in reality a bookkeeping device for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members. Such jobber members, in fact, purchase their requirements of respondent's products direct from the respondent and at the same time receive a more favorable price or higher rebate based upon the combined purchases of all of the members.

14. Illustrative of the monetary benefits derived by the individual jobber member of such group buying organizations, as opposed to those individual purchasers buying without the benefits of such group consolidation of purchases is the following tabulation taken from Commission's Exhibits 21-V and 21-W, dealing with the transactions between respondent and the Mid-South Distributors, Inc.:

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AUTOMOTIVE JOBBER "GROUP-BUYING" METHOD OF PURCHASE

-1-	-2-	-3-	-4-	-5-	-6-
Manufacturer's Published Discount Schedule to Trade					
Net Purchases	Retroactive Rebate	Actual Net Purchases Each Member Jobber	Mfr's Schedule Discount Rate Applicable	Mfr's Schedule Discount Amount Due	Mfr's "Group" Discount Rate	Mfr's "Group" Discount Amount Paid	Actual Price Difference
		1. $ 1,369.08	5%	$ 68.45	19%	$ 260.13	$ 191.68
		2. 2,408.24	5%	120.41	19%	457.57	337.16
Under $1,000	None	3. 1,530.00	5%	76.50	19%	290.70	214.20
$ 1,000-$4,999	5%	4. 585.96	None	—	19%	111.33	111.33
5.000- 7,499	7½%	5. 2,594.97	5%	129.75	19%	493.05	363.30
7,500- 9,999	9%	6. 1,483.65	5%	74.18	19%	281.89	207.71
10,000-12,499	10%	7. 3.728.45	5%	186.42	19%	708.41	521.99
12,500-14,999	12%	8. 6,656.06	7½%	609.20	19%	1,264.65	655.45
15,000-17,499	14%	9. 2,759.69	5%	137.98	19%	524.34	386.36
17,500-19,999	15%	10. 3,440.61	5%	172.03	19%	653.72	481.69
20,000-22,499	16%	11. 1,492.70	5%	74.64	19%	283.61	208.97
22,500-24,999	17%	12. 750.92	None	—	19%	142.67	142.67
25,000-27,499	18%	13. 3,610.53	5%	180.53	19%	686.00	505.47
27,500 and over	19%	14. 1,072.02	5%	53.60	19%	203.68	150.08
	Totals	$33,482.88		$1,883.69		$6,361.75	$4,478.06

15. In following the pricing practices hereinabove described, respondent has discriminated in price by means of rebates allowed by it in the sale of its various automotive products and related items as between respondent's competing distributors and also between respondent's distributors and competing group buying jobbers, and the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations.

16. The respondent did not grant exclusive territory to any of its customers and has had more than one distributor in various trade areas who were, in fact, in competition with each other and also in competition with group buying jobbers, who sold respondent's replacement parts to dealers and other purchasers in their respective trade areas. The price discriminations received by some distributors as compared with others, competing with them in the same trade are, as a result of respondent's pricing plan, is shown by a number of tabulations taken from the respondent's books and records which were received in evidence as Commission's Exhibits 61 through 79-G, inclusive. These tabulations show the prices paid and the rebates received by purchasers located in various trade areas throughout the United States during the years 1947 through 1950. Testimony was taken of distributors of the respondent in four trading areas, as shown on the tabulations—New Orleans, Memphis, Denver, and Dallas. The amounts purchased by the distributors in these areas and the discounts and rebates received by them on both the leaf spring line and the coil action line are as follows:

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Leaf Spring, Coil Spring and Chassis Parts Line:

Name of Purchaser	Net Purchases	Amount	Percentages
New Orleans			
Greiner Auto Parts Co.*	$ 3,373.71	$ 472.32	14.00
Auto Chassis & Spring Co.	1,687.68	84.38	5.00
Dealers Truckstell Sales, Inc.	447.30	22.36	5.00
Memphis			
Mills-Morris Co.*	5,301.09	792.84	14.96
Ozburn-Abston & Co.	14,681.31	2,201.12	14.99
J. B. Cook Auto Machine Co.	1,260.25	189.04	15.00
Dealers Truckstell Sales, Inc.	922.54	46.13	5.00
McKee-Moog Spring Co.	26,230.04	3,409.91	13.00
Dallas			
Automotive Appliance Co.*	216.63	26.00	12.00
Motor Supply Co. of Dallas*	1,301.62	156.19	12.00
American Gear & Parts Co.*	553.76	74.59	13.47
Terry Automotive Supply*	955.42	143.31	15.00
Henderson Auto Parts	523.18	–0–	–0–
Truett-Worrell Spring & Aligning	4,090.16	298.15	7.29

*Greiner Auto Parts Co. was a member of Cotton States, Inc., a group buying organization; Mills-Morris Co., a member of Mid-South Distributors, Inc.; Ozburn-Abston & Co., a member of Ozburn-Crow & Yantis Co.; Automotive Appliance Co. and Motor Supply Co. of Dallas, members of Ark-La-Tex Warehouse Distributors, Inc.; American Gear & Parts Co., a member of Automotive Southwest, Inc., and Terry Automotive Supply, a member of Southwestern Warehouse Distributors.

Coil Action Line:

Name of Purchaser	Net Purchases after deducting cash discount and excise tax and other credits	Amount of Rebate	Percentage
New Orleans			
Auto Spring & Brake Serv.	$5,765.40	$ 432.41	7½%
Auto Chassis & Spring Co.	296.30	–0–	–0–
Auto Shock Absorber Sales	1,241.69	66.69*	5%
Greiner Auto Parts Co.*	749.88	67.48	9%

Memphis			
J. B. Cook Auto & Machine Co.	1,643.60	164.36	10%
McKee-Moog Spring Co.	5,497.27	412.30	7½%
Ozburn-Abston Co.*	9,101.10	1,729.21	19%
Mills-Morris Co.*	1,546.91	247.51	16%
Denver			
Foster Auto Supply Co.	56.83	10.38**	17%
Steckel Auto Supply Co.	2,646.06	132.30	5%
B. K. Sweeney Elec. Co.	3,548.45	177.42	5%
Western Spring Service Co.	900.67	–0–	–0–

*Greiner Auto Parts Co. was a member of Cotton States Inc., a group buying organization; Ozburn-Abston Co., a member of Ozburn-Crow & Yantis Co.; and Mills-Morris Co., a member of Mid-South Distributors, Inc.

**Computed on "Net Sales" before deducting "Cash Discount" and "Excise Tax".

17. There is nothing in the record to indicate that the above trading areas are unique or different from other trading areas where respondent sells its products at differing prices. It is therefore concluded that competitive conditions shown to exist in these four areas, with respect to purchase and resale of respondent's products are typical and representative of the other areas in the United States and that respondent's distributors reselling respondent's products in the same trading area are in competition with each other in the resale of such products.

18. The inequities arising from the annual volume rebate plan based solely on total yearly purchases and which completely ignores the size and quantity of individual purchases is illustrated by Commission's Exhibit 69 which is set out as follows:

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D. 5723 — MOOG INDUSTRIES, INC.

Summary by Discount Brackets of No. of Customers and Average Annual Coil Action Purchases — 1947, 1948 and 1949.

Net Purchases	Rebate	1947 No. of Customers	1947 Average Annual Purchases	1948 No. of Customers	1948 Average Annual Purchases	1949 No. of Customers	1949 Average Annual Purchases
Under $1,000	None		$		$		$
$ 1,000 to 4,999	5%	369	2,238	426	2,143	352	1,911
5,000 to 7,499	7½%	38	6,235	59	5,895	27	5,499
7,500 to 9,999	9	22	8,279	26	7,705	4	8,372
10,000 to 12,499	10	8	11,031	8	8,770	6	10,660
12,500 to 14,999	12	5	13,676	10	11,945	4	13,667
15,000 to 17,499	14	2	16,237	2	13,715	5	9,277
17,500 to 19,999	15	3	18,966	5	15,138	2	18,735
20,000 to 22,499	16	1	20,940	0	—	0	—
22,500 to 24,999	17	1	22,734	1	22,987	1	23,444
25,000 to 27,499	18	0	—	0	—	1	26,887
27,500 and over	19	7	38,488	11	36,065	5	33,471

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This exhibit shows that in 1947, 456 purchasers participated in the rebate plan on coil action line sales; in 1948, 557 purchasers participated; and in 1949, 407 purchasers participated in the rebate plan. In none of the years selected did as many as half of the purchasers from respondent receive a rebate on their purchases, and for the most part, only approximately one-third of the purchasers from respondent were favored with the lower prices resulting from the granting of said rebates.

19. The record, based upon the tabulations in evidence in this proceeding, disclosed substantial differences in the net purchase prices paid by competing purchasers of respondent's products for re-sale. The substantiality of the amount represented by such price differences with relation to the purchasers' net profit margin is conclusively shown when compared with the competitive effect of the amount represented by the 2 percent cash discount. Distributors of respondent, who testified in this proceeding, stated that they invariably took advantage of the 2 percent cash discount as being essential in the conduct of their respective businesses and that such discount reduced the cost of acquisition of respondent's products. This 2 percent reduction in cost of acquisition is substantial and may account for a substantial portion of the margin of profit. One jobber of respondent, ranking third or fourth in the Dallas, Texas, trade area, testified that the overall net profit for his company ran less than 4 percent. By the very nature of the business operated by the various jobber customers of respondent their profit was necessarily based upon an accumulation of small margins of profit on many items. Some of the witnesses handled 15 to 75 lines, involving an aggregate of thousands of items. Practically all of respondent's jobber customers extend the same cash discount they received to their customers, however, on a mark-up of acquisition cost, the discount actually given by such customer to its purchaser on resale will be greater than the 2 percent cash discount.

20. In the course of this proceeding it was the contention of the respondent that no injury to competition existed by reason of respondent's pricing prac-

tices because its customers generally followed the suggested resale price lists, issued by the respondent, in the resale to their respective customers. In support of this contention, the respondent introduced testimony of a

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number of distributors that they had not suffered any injury by reason of differing or higher prices paid by them as compared with prices paid by competitors in their respective trade areas. On cross-examination, these witnesses admitted that their reasons for stating that they had not been competitively injured was due to the fact that their competitors all followed the suggested resale price of the respondent and that there was no price competition in their particular trade areas.

21. The fact that price competition may have been eliminated in some areas because of uniformity of resale price does not eliminate the question of injury to competition. Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less nonexistent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exists.

22. The contention by the respondent that no injury to competition can be proven or inferred where the discriminatory discount has not been used to reduce the sale price, is without merit as a defense in this proceeding and has been so held by the United States Supreme Court. In F. T. C. v. Morton Salt Company, 334 U. S. 37, the Supreme Court held that where purchasers, buying and competing in the resale of the same merchandise, are charged different prices therefor, the conclusion is inescapable that in-

jury to the competitive efforts of the unfavored purchasers is present. In this connection the Court said, "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence." In the present case the evidence more than meets this test.

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23. It was also contended by the respondent that the replacement parts sold by it to competing customers have not been shown to be of like grade and quality, and as a basis for this contention respondent has taken the position that such parts to be of like grade and quality, under 2(a) of the Clayton Act, must pass the test of interchangeability. This would, in effect, be saying that merchandise to be of like grade and quality must be identical. If Congress had intended to so require it would have said so. We do not have here different grades of merchandise designed to sell at different price levels, such as first quality line and a second or inferior quality line. All of respondent's products are of the same grade and quality.

24. Respondent's distributors purchased respondent's replacement parts, not as individual items, but as part of a line designed to supply the needs of garages and others engaged in the repair of motor vehicles. The respondent has grouped its automotive replacement parts for discount purposes into three separate categories which are referred to as respondent's coil action line, leaf spring line and piston ring line. Each one of these lines carries a separate and different retroactive volume rebate. Respondent has made the selection of the parts to go into the various lines,

and the rebates granted to purchasers of such lines apply to each and every item in the line. Having grouped its parts for discount purposes, the respondent cannot logically contend that items within the group are not of like grade and quality, or that distributors in the same trade area, who purchase items within the group for resale, are not competitive.

25. The Robinson-Patman Act is an antitrust statute designed to preserve equal competitive opportunity. Respondent's contention of interchangeability places the existence of like grade and quality solely on functional similarity and thereby ignores the effect upon competitive opportunity. When the respondent sells replacement par... classified into the three lines described above, to its distributors, who resell in competition with each other in their respective trade areas, the functional similarity of the individual items in each class is no longer of consequence because from a competitive standpoint they are all of like grade and quality. It also appears from the record that distributors in order to supply the needs of their garage customers would purchase substantially all of

(Part 1, Page 151) (This Transcript as filed in 9 parts, and references to the Transcript are to particular part and page.)

the items in respondent's various lines over a period of time, their purchases of the items being dependent upon the demands of their customers. It must accordingly be concluded that the discriminations in price herein found were, in fact, made in connection with the sale and distribution of merchandise of like grade and quality and that the defense that such products must pass the test of interchangeability is without merit.

26. The respondent in its answer did not assert a defense of meeting competition under Section 2(b) of the Clayton Act and did not request a finding on this issue in its proposed findings submitted to the Hearing Examiner. However, the attorney for the respondent did announce on the record that he intended to introduce testimony on the defense of meeting competition. While respondent did

consider and compare competitors' prices in preparing its price list, the price differentials and the discriminations in price did not occur from the use of the price list or deviations from such price list to individual customers, but instead arose out of the pricing practice involved in the use of a pricing plan consisting principally of a non-retroactive volume rebate. There is no evidence that the respondent either met the price of a competitor or any rebate or discount schedule used by a competitor. In fact there was no uniformity in the discount schedules of competitors; some used a retroactive volume rebate; some a non-retroactive volume rebate; some a flat percentage discount; and others an incentive rebate based on turnover of merchandise or maintenance of stock.

27. The activity of the respondent in meeting competition was summed up by respondent's executive vice president who said, in referring to the use by respondent of the discount schedule of the Wausau Motor Parts Co., in determining respondent's pricing policy, "We would examine it. We would try to evaluate the effect of Wausau on our market, how close we would have to come to meeting the competitive offer and how far away we should stay because of certain pitfalls which it may lead us into, and upon examination of this we would use our own good judgment and experience to try and work this thing in with all of the others and come out with a contract and a schedule which we feel would earn us the greatest amount of profit and lose us the smallest number of customers and attract the most." This might be adopting a pricing practice or sales system best suitable for the respondent in a competitive market, irrespective of any discriminating

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effect, but it does not constitute a showing that lower prices to some favored customers, resulting from the pricing practice, were made in good faith to meet an equally low price of a competitor.

28. Section 2(b) of the Clayton Act does not mean that a seller can use a sales plan which constantly results in

his getting more money for like goods from some customers than he does from other customers competing with them. This was definitely decided by the United States Supreme Court in F. T. C. v. A. E. Staley, 374 U. S. 746, 753, in which the Court stated that Section 2(b) "does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor'. The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition * * *. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by Section 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another." It must therefore be concluded that respondent's price discriminations were not made in good faith to meet an equally low price of a competitor and that respondent's attempted defense under Section 2(b) of the Clayton Act is without merit.

CONCLUSION.

The aforesaid discriminations in price by the respondent as herein found constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER.

It Is Ordered, that the respondent Moog Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale for replacement purposes of automotive replacement parts, consisting of coil action parts, leaf spring, coil spring, chassis

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parts, piston rings and other related items in commerce, as "Commerce" is defined in the Clayton Act, do forthwith

cease and desist from discriminating in the price of such products of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competed with the purchaser paying the higher price in the resale and distribution of respondent's products.

/s/ Earl J. Kolb
Hearing Examiner.

March 5, 1954.

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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of MOOG INDUSTRIES, INC., a corporation	Docket No. 5723

NOTICE OF INTENTION TO APPEAL FROM INITIAL DECISION.

(Federal Trade Commission Received Mar 26 1954 Secretary)

Please take notice that the respondent Moog Industries, Inc., intends to appeal from the initial decision of the Hearing Examiner filed with the Commission on March 8, 1954, and first notification of which was received by counsel for respondent by ordinary mail on March 25, 1954.

Moog Industries, Inc.,
By /s/ E. S. D. Butterfield
Its Attorney

Chicago, Illinois
March 25, 1954.

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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Edward F. Howrey, Chairman
Lowell B. Mason
James M. Mead
John W. Gwynne
Robert T. Secrest

In the Matter of MOOG INDUSTRIES, INC., a corporation	Docket No. 5723

FINAL ORDER.

Respondent Moog Industries, Inc., having filed on July 13, 1954, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It Is Ordered that respondent Moog Industries, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

By the Commission, Commissioner Mason dissenting.

/s/ Robert M. Parrish
Secretary.

(Seal)

Issued: April 29, 1955

Attached are:

(1) Opinion of the Commission by Commissioner Secrest.

(2) Concurring opinion by Chairman Howrey; and

(3) Dissenting opinion by Commissioner Mason.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Edward F. Howrey, Chairman
Lowell B. Mason
James M. Mead
John W. Gwynne
Robert T. Secrest

In the Matter of MOOG INDUSTRIES, INC., a corporation.	Docket No. 5723

OPINION OF THE COMMISSION.

By Secrest, Commissioner:

This case is before us on respondent's appeal from the hearing examiner's initial decision.

Respondent, Moog Industries, Inc., is charged with having discriminated in price between different purchasers of its automotive replacement parts in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[1] Hearings were held at which testimony and other evidence in support of and in opposition to the complaint were introduced and the hearing examiner, after considering the entire record, made his initial decision in which he found that respondent's pricing practices have resulted in price discriminations between competing customers and that the effect of the discriminations "may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations." The order in the initial decision prohibits respondent from discriminating in price:

"By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who,

[1] 15 U. S. C., sec. 13.

in fact, competes with the purchaser paying a higher price in the resale and distribution of respondent's products."

Respondent, in its appeal, takes exception to specific findings and conclusions in the initial decision as well as to certain procedural matters, including rulings of the hearing examiner. Exception is also taken to the substance and form of the hearing examiner's order to cease and desist. We consider first respondent's contention that as a result of certain alleged procedural errors it has not been accorded a fair and impartial hearing.

During the course of the proceeding respondent made two requests for a bill of particulars, the first before it filed its answer and the second at the conclusion of the taking of evidence in support of the complaint. The Commission denied respondent's first request and the hearing examiner denied the second. Respondent claims that by such denials prejudicial error was committed. In its order denying respondent's original request for a bill of particulars, the Commission expressed the view that the complaint was sufficient to advise respondent of the nature of the charges against it. We are still of that view.

We are also of the view that the hearing examiner's refusal to grant respondent's motion for a bill of particulars was not prejudicial. The function of a bill of particulars is to enable the moving party to prepare for responsive pleadings and then only to the extent that it is required for that purpose; the office of the bill is related to pleading, not to trial. During the presentation of the case in support of the complaint respondent became fully informed as to the scope and details of the charges against it. Continuances are freely granted in Commission proceedings and respondent had full opportunity to study the record before proceeding. There was no possibility of "surprise" to the respondent or inopportunity properly to prepare its case.

During the course of the hearings respondent moved the hearing examiner to issue a rule requiring counsel supporting the complaint to make certain elections from the evidence which would be relied upon to constitute the case against the respondent. As grounds for the motion

respondent stated, in substance, that by virtue of the undue proliferation of evidence which had been offered and received over respondent's objection, including voluminous tabulations with respect to sales by respondent to customers in many different communities during many months and years, involving hundreds of different automotive parts and thousands of invoices, there had been placed upon the respondent the almost insurmountable burden of analyses and proof, requiring the breakdown of thousands of invoices and cost allocations, requiring thousands of man hours of time and extensive, exorbitant and needless work, and causing respondent to be faced with the situation wherein it was impossible for it to receive a fair and impartial hearing. The hearing examiner denied respondent's motion and the Commission refused to entertain respondent's appeal from that ruling.

Respondent's motion was made at a hearing held on June 23, 1953. Counsel supporting the complaint rested their case on June 2, 1952. In the interval between those dates, at hearings held in St. Louis, Denver, Dallas, New Orleans, Memphis and New York, respondent introduced considerable evidence in opposition to the complaint. There is no indication that respondent did not know the issues it must meet during the presentation of this evidence. The evidence introduced in support of the complaint was that which counsel supporting the complaint believed necessary to establish respondent's practice of price discrimination. It does not appear that respondent has advanced any defense to this proceeding which would require it to analyze or break down each of the numerous transactions represented in the tabulations. We think the motion was properly denied by the hearing examiner and are accordingly rejecting respondent's contention that prejudicial procedural errors were committed which prevented it from having a fair and impartial hearing.

Respondent does a substantial business in the manufacture and sale of automotive replacement parts consisting of coil action parts, leaf springs, coil springs, chassis parts, piston rings and related items. Respondent has classified the products itself into three lines, namely, leaf springs line, including coil springs and chassis parts; coil action

line and piston ring line. Respondent sells its products in every State of the United States and in 1950 maintained 25 branches and warehouses in the principal cities. In 1949 respondent sold its products to approximately 1,200 coil ring accounts, 800 leaf springs accounts, and 400 piston ring accounts.

During the period covered by this proceeding respondent sold its products to customers designated by respondent as distributors at the prices appearing in respondent's distributor net price sheets, less specified discounts, allowances and rebates. Respondent's customers resold these products to garages, service stations, fleet owners and other jobbers. Respondent from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products. Respondent's base price was the same to all customers. The price differences with which we are concerned arose from the practice of granting discounts or paying rebates to customers, the amount being determined by each customer's total annual net purchases or, in the case of purchasers who purchased through a group buying organization, by the aggregate annual net purchases by all members of a particular group.

The annual volume rebates available to customers were incorporated in and made a part of the franchise agreement which respondent entered into with its distributors and group buying organizations. A different volume rebate schedule was applicable to each of the three lines. For example, on the coil action line the amount of the retroactive volume rebate ranged from 5% on annual net purchases of $1,000 to 19% on annual net purchases of $27,500 or more. On the piston ring line the range was from 2% on annual net purchases of $2,000 to 20% on annual net purchases of $30,000 or more. On the leaf spring line the retroactive volume rebate schedule adopted as of July 1, 1949, provided for rebates ranging from 5% on annual net purchases of $1,000 to 15% on annual net purchases of $35,000 or more. In addition to the volume rebate, respondent allowed a 10% warehousing and redistributing commission to distributors who resold respondent's products to jobbers who had been approved by re-

spondent, provided the combined earnings of the warehousing and redistributing commission and the volume rebate on any line could not exceed the earnings figured at the maximum volume rebate for that line.

In 1949, respondent had franchise agreements with 15 group buying organizations. The jobber members of these groups forwarded their orders for respondent's merchandise either directly to respondent or through the group office. The merchandise was shipped by respondent direct to the jobber members but the billing for same was to the group office. The annual volume rebate, which was computed on the basis of the aggregate of the purchases by all members of a group, was paid to the group office, which in turn made distribution to the jobber members on the basis of each member's purchases. In other words, under this arrangement members of the group buying organizations were granted discounts or paid rebates based on the total purchases by all members of the group rather than on the total purchases of the individual member, with the result that many such purchasers received a more favorable price or higher rebate than other competing purchasers who did not purchase through group buying organizations.

Substantial differences in the net purchase prices paid by competing purchasers have resulted from the above-described pricing practices. The record contains a number of tabulations prepared from respondent's accounts and records showing details of respondent's sales of two of its three lines to customers in a number of different trading areas. These tabulations reflect differences in net buying prices between customers in the same trading area of varying amounts and percentages, with some differences amounting to as much as 19%. For example, respondent in 1950, sold its leaf springs line to six customers in Dallas, Texas, all of whom were in competition with each other in the resale of respondent's products. Four of these purchasers purchased through group buying organizations at net prices ranging from 12% to 15% off list price. One customer received no discount or rebate on its purchases and the largest purchaser received a rebate of 7.29% on its total net purchases.

The inequities of respondent's annual volume rebate plan are further demonstrated by the fact that in 1949, for instance, of the approximately 1,200 purchasers of respondent's coil action line, there were only 407 purchasers who received a rebate on their purchases, and that 352 of these 407 received a rebate of only 5%, all as illustrated by the following tabulation:

Net Purchases	Rebate	Number of Customers	Average Annual Purchases
Under $1,000	None		
$ 1,000 to 4,999	5%	352	$ 1,911
5,000 to 7,499	7½%	27	5,499
7,500 to 9,999	9%	4	8,372
10,000 to 12,499	10%	6	10,660
12,500 to 14,999	12%	4	13,667
15,000 to 17,499	14%	5	9,277
17,500 to 19,999	15%	2	18,735
20,000 to 22,499	16%	0	—
22,500 to 24,999	17%	1	23,444
25,000 to 27,499	18%	1	26,887
27,500 and over	19%	5	33,471

The substantiality of respondent's price differences and the probability of injury to competition can best be shown by comparing it with the competitive effect of the amount represented by respondent's standard 2% discount for cash given to all customers. Distributors of respondent testified that they invariably took advantage of this 2% cash discount and that this discount was essential to the conduct of their respective businesses. Testimony in the record also indicates that the market in which these distributors compete is highly competitive with many dealers handling from 15 to 75 different lines of automotive products consisting of thousands of items, many of which sell for only a few cents. The dealers' financial life depends on the aggregate of small margins of profits made on a number of individual automotive items. One jobber in Dallas, Texas, ranking third or fourth in that area, testified that his overall net profit on automotive items ran less than 4%. With overall net profit so low discounts to favored customers, ranging up to 19%, could well mean the difference between commercial life and death if these discounts

were extended to a sufficient number of items purchased by a distributor. Nor is it controlling that the items herein considered may constitute only a very small part of the dealers' total sales. As the Supreme Court said in the Morton Salt case[2]:

> "There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery stock consists of many comparatively small articles, there is no possible way to effectively protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

Respondent contends that the evidence in the record does not support the hearing examiner's finding that "the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and customers who do not receive the benefit of such discriminations." This contention appears to be based largely on the fact that respondent's customers testified generally that they had not been injured by reason of the higher prices paid by them as compared with prices paid by their competitors in the same trading area. On cross examination, however, these same witnesses admitted that their reasons for so testifying was due to the fact that both they and their competitors followed the suggested resale prices of the respondent and that there was no price competition in their particular trade areas. The adherence by respondent's customers to its suggested resale prices does not eliminate the question of injury to competition. As the Supreme Court said in the Corn Products case[3]:

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[2]Federal Trade Commission v. Morton Salt Co., 334 U. S. 37 (1948).

[3]Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726, 742 (1945).

"But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

The hearing examiner in his initial decision found that:

"Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less non-existent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exist."[4]

In support of the hearing examiner's finding of the requisite statutory injury, there is in the record reliable respectable probative evidence in the form of testimony that respondent's 2% discounts for cash were invariably taken by respondent's customers and that these customers considered this discount essential to the conduct of their business. Additionally, some witnesses testified that in order to expand their business, it would be necessary to hire additional salesmen, handle more lines, and provide additional services to customers which could only be effected through increased profits. We believe that the hearing examiner was justified in concluding that respondent's annual volume rebate plan resulted in price discriminations violative of the Robinson-Patman Act.

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[4]*Cf.* Initial Decision of the Hearing Examiner, Docket 5771, In the Matter of Namsco, Inc., adopted by the Commission March 17, 1953.

Respondent further contends that the evidence does not establish that it has discriminated in price between any specifically named purchaser of the same type of automotive products or supplies of like grade and quality who were competitively engaged in the resale thereof during the same period of time and in the same market area. Respondent's customers do not purchase respondent's products as individual items. They purchase them as part of a line designed to supply the needs of garages and others to whom the products are resold. The rebates were not granted on the basis of the individual items purchased but on the basis of the total dollar purchases of a particular line. The price differentials involved did not arise from any difference in the grade or quality of the products sold to different customers. Instead, they arose from varying rebates on an entire line, The very nature of the businesses carried on by respondent's customers required that they carry substantially all of the items in a particular line, and many purchasers of the same line of respondent's products were in competition with each other in the resale of such products to garages, service stations, and others. We think the hearing examiner properly found that the discriminations in price were made in connection with the sale and distribution of merchandise of like grade and quality.

We now consider respondent's objection to the order to cease and desist in the initial decision. Respondent contends that the order is too broad in its scope and exceeds the authority of the Commission by including the officers, representatives, agents and employees of the respondent and by covering "piston rings" and "other related items." Respondent additionally contends that the order is faulty in that it is not limited to prohibiting price discriminations which injure secondary line competition; that it is not limited to prohibiting price discriminations in the sale of specific types of automotive replacement parts, and that it contains no guiding yardstick by means of which respondent can determine the lawfulness or unlawfulness of its pricing practices.

In support of its argument that the order should not run against its officers, representatives and employees,

respondent cites the decision of the United States Court of Appeals for the Seventh Circuit in the Reynolds Tobacco case[5] which involved an order issued pursuant to the Federal Trade Commission Act. The Seventh Circuit Court in its more recent decision in the Anchor Serum case[6] held, however, that the order in a Clayton Act case was properly directed against the "officers, representatives and employees" of the corporate respondent and this same holding appears appropriate here.

The further argument that the order should not include "piston rings" and "other related items" appears to be without merit. The record shows that respondent sells piston rings to the same type of purchasers, that is, automotive jobbers, as it sells its other products, and that similar pricing practices were employed. The Commission's power is not limited to prohibiting the identical practices which have resulted in illegal price discriminations. It has the authority and duty to also prohibit acts of the same type or class as those which have been committed in the past.[7]

The Supreme Court in the Ruberoid case[8] considered arguments with respects to the breadth of Commission orders to cease and desist in a Section 2(a) proceeding similar to those here presented by respondent. The Court observed that:

> "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required

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[5]Reynolds Tobacco Co. v. F. T. C., 192 F. 2d 535 (1951).

[6]Anchor Serum Co. v. F. T. C., 217 F. 2d 867 (1954).

[7]Hershey Chocolate Co. v. F. T. C., 121 F. 2d 968 (1941).

[8]F. T. C. v. Ruberoid Company, 343 U. S. 470 (1952).

to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."

In rejecting respondent's contention that the order to cease and desist in the initial decision is too broad in scope, it is pointed out that under the decision in the Ruberoid case the fact that the order does not spell out in detail every phase of the statute does not in any way prejudice the respondent. Implicit in every Commission order are all the statutory defenses by means of which respondent can determine the lawfulness or unlawfulness of its practices just as if the order had set them out *in extenso*. We believe that the order, as drafted, is proper and that the statute and the courts have provided respondent with a proper yardstick for determining, under the order, the lawfulness or unlawfulness of its future practices.

Finally, we consider respondent's contention that:

> "Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, as construed and applied in this proceeding offends the constitutional standards of definiteness and reasonableness of due process of law under the Fifth Amendment to the Constitution of the United States."

Respondent argues under this contention that Section 2(a) of the amended Clayton Act "is admittedly a vague, indefinite ambiguous statute," and that it is well settled that "a statute may be so vague as to violate the due process clause of the Fifth Amendment to the Constitution of the United States." If, as we construe it, respondent's contention in this regard can be interpreted as raising the issue of the constitutionality of Section 2(a) of the amended Clayton Act, the obvious answer is that it is not within the province of this Commission to pass upon the constitutionality of the statutes it is charged with administering.

". . . an administrative agency, invested with discretion, has no jurisdiction to entertain constitutional questions where no provision has been made therefor[10]."

We believe that the initial decision of the hearing examiner is adequate and appropriate to dispose of this proceeding, and respondent's appeal therefrom is accordingly denied.

Commissioner Mason dissents.

April 29, 1955

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Edward F. Howrey, Chairman
Lowell B. Mason
James M. Mead
John W. Gwynne
Robert T. Secrest

In the Matter of MOOG INDUSTRIES, INC., a corporation. } Docket No. 5723

Chairman Howrey, concurring:

The record contains direct and substantial evidence showing probability of injury to competition in the secondary line, namely, in the distribution of automotive parts through jobbers and dealers. For this reason I concur in the majority opinion.

April 29, 1955

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[10]Engineers Public Service Co. v. Securities & Exchange Commission, 138 F. 2d 936.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Edward F. Howrey, Chairman
Lowell B. Mason
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Robert T. Secrest

In the Matter of MOOG INDUSTRIES, INC., a corporation.	Docket No. 5723

DISSENTING OPINION.

By Mason, Commissioner

This is a Section 2 (a), Clayton Act case. Three elements must be found present to legitimatize a cease and desist order here. They are:

1. Interstate commerce;
2. Disparate discounts or rebates to competing customers (these two we need not consider because in the instant case both sides concede their existence); and
3. The disparate discounts must have at least one of the following effects:
   a. May substantially lessen competition;
   b. Tend to create a monopoly;
   c. Injure, destroy or prevent competition.

As long as the billion dollar auto parts makers are around, we need not fear defendant Moog will destroy General Motors, Ford, Chrysler, et al., nor is this independent auto parts maker apt to create a monopoly or substantially lessen, destroy or prevent competition with these or any of the other big companies in the primary line of commerce.

This leaves but one question for us to answer. Has there been injury in the secondary line of commerce; that is, injury to those customers of Moog who got smaller quantity discounts than others?

The Supreme Court has always held that an inference of injury can be drawn from the substantial difference in discounts alone, without any direct testimony of injury. For as the late Mr. Justice Jackson once opined:

> "The law of this case, in a nutshell, is that no quantity discount is valid if the Commission chooses to say it is not."[1]

Relying on this carte blanche authority granted us,[2] the prosecutor based his case on the disparate discounts admitted by both sides.

At this stage in the case if the Commission chose to infer (and it did) that the discounts injured some of Moog's customers, it could do so, and well enough. The prosecution's contention that injury to competition existed was based upon inferences drawn from the fact that there were differences in discounts and rebates.

This is as far as the prosecution had to go, though, of course, the direct and most sensible way to ascertain the real truth regarding injury would be to call those who were supposed to be injured; that is, Moog's customers who received the smaller quantity discounts.

These, the prosecution by-passed.

However, before the trial was over, the defendant himself subpenaed the missing witnesses.

This meant traveling all over the country—Dallas, Denver, New Orleans, Memphis and New York City. Of course, defendant could have avoided these long journeys if it had been willing to admit for the sake of the record

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[1] F. T. C. v. Morton Salt Co., 334 U. S. 37, at page 58.

[2] "The Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition." F. T. C. v. Morton Salt Co., 334 U. S., at page 47.

that it had injured its customers, but it refused to do so. In the ensuing safari, every witness called positively denied he suffered any competitive injury from the challenged discounts or rebates[3]—a position they all stoutly maintained in spite of the badgering the prosecutor gave them for ruining the Government's case.

In this day and age of phony informers, it is heartening to behold American businessmen reject Government's cozening of witnesses to get them to say they were injured, when in fact they weren't. The Government's position is faintly reminiscent of the personal injury lawyer whose advice at the scene of an accident was to "lie down and groan until the claim agent arrives."

Only in the instant case the so-called "injured competitors" refused to lie down or groan.

To top all of this, the Government was finally forced to concede that if all other jobber witnesses who received the lesser discounts were to be summoned to the stand, they, too, would deny they had been injured.[4]

If there had been no direct evidence on the question of injury, inferences could fill in the empty spaces. But the spaces had best be empty of direct facts before an inference is invited in.

With many hundreds of witnesses[5] admittedly ready to back up the testimony of a dozen or more who had already denied the injury, and with not a soul willing to impeach their assertions of no injury, we find an entirely different aspect put upon the case.

Justice requires that we give precedence to direct evidence over inferences.

For inferences and facts are two different things. Their standing might be compared to mistresses and wives.

Inferences are compliant things, swaying to the whim of those who draw them. While facts, like wives, can be

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[3]See digest of testimony in appendix.

[4]R. p. 943.

[5]The number of defendant's accounts is not set out with exactitude, but the Hearing Examiner's report indicates they run into the thousands.

harsh, unbending, and often block the selfish aims of those who must live with them; they do nevertheless carry a badge of legitimacy that no unsupported inference has ever been able to achieve.

To prevent predelictions guiding our judgments rather than cold facts, reviewing courts frown on us if our orders are based on inferences when direct testimony to the contrary bars the way. For as Mr. Justice Stephens says in United States v. U. S. Gypsum:

> "A fact may not be inferred from a proven fact or facts where unimpeached and uncontradicted testimony consistent with such proven fact or facts but inconsistent with the fact sought to be inferred, is in the record."[6]

Like a belligerent wife crashing in on an assignation with a hussy, the direct testimony of the alleged injured customers that they in fact were not injured, broke up the inference of injury so necessary to the Government's case.

In spite of this, my learned majority of the Commission has

> Divorced Cold Solid Reason from its bed
> And taken Inferences Instead.[7]

On such a pretense Government has snatched itself a victory, but at what a cost.

In my opinion, the effectiveness of cease and desist orders rests on the respect their paternity commands.

An order born from the legitimate union of direct facts naturally ranks highest. In the absence of direct factual testimony, findings on inferences may support an order, but it will be countenanced with about the same degree of condescension a common law wife receives in polite society.

But not even this low degree of acceptance will be accorded the order in the instant case, for in the face of direct testimony controverting the inferences of guilt, the

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[6]67 F. Supp. 397, (1946) at page 450.

[7]With apologies to Omar Khayyam.

Commission has drawn an order which commands neither the respect of the public nor, in my opinion, will it receive the approval of reviewing courts.

We are judged by the level at which we solve our problems.

To take inferences that serve our ends and reject facts presents an inaccurate and unhappy picture of what should be our most sacred institution—the judiciary.

The Commission has won a cease and desist order.

But I doubt if the ends are worth the means.

For myself—

I am against it.

/s/ Lowell B. Mason,
Commissioner.

April 18, 1955.

APPENDIX.

(Digest of testimony, R. pages 617-899.)

Q: Have the pricing practices of Moog in the leaf spring line or in this coil action sales line, have either or both of them injured you competitively necessarily?

A: No.

* * *

Q: I will ask you whether you know whether or not the fact that an allowance of 15 percent was made to the Terry Automotive Supply Company injured your company, American Gear and Parts Company, competitively in the distribution of Moog Industries' leaf springs, coil springs, and chassis parts during the period indicated?

A: No, sir.

Q: Do you know whether it did?

A: No, sir. Frankly, I didn't know Terry Automotive had Moog up until three or four months ago.

Q: Well, were you injured competitively by it?

A: No, sir.

Q: By virtue of the spread you were not?

A: No, sir.

• • •

Q: And I will ask you if you know whether or not you were injured competitively during that period of time by virtue of the fact of this differential spread on allowances off distributor's net prices in the purchase of Moog leaf springs, coil springs and chassis parts resold by you to your customers?

A: Yes.

Q: You were so injured?

A: No.

• • •

Q: I ask you if you know whether or not for that period of time the Motor Supply Company of Dallas suffered any competitive injury by virtue of this differential in allowances off of distributor's net prices in purchases of leaf springs, coil springs and chassis parts from Moog Industries, which they purchased from Moog and resold to its customers?

Q: Do you know whether or not you were injured?

A: I do.

Q: Were you so injured?

A: No.

• • •

Q: And I will ask you would you know whether or not by virtue of the spread and differential in allowances off of distributor's net prices the Henderson Auto Parts Company was competitively injured in the purchase of leaf springs, coil springs and chassis parts from Moog Industries, Inc., in the sale of such products to its customers?

A: Yes.

Q: Was it so injured?

A: I do not think so.

• • •

Q: Do you know whether by virtue of this difference in percentages in payment for coil action parts from Moog

Industries by your company and the other companies shown there, do you know whether or not you were injured competitively?

A: Yes I know.

Q: Were you injured competitively?

A: No, I was not injured competitively, in my opinion.

* * *

Q: Now do you know whether for that period of time so shown on that exhibit Auto Chassis and Spring Company was injured competitively in the purchase and sale of Moog coil action parts in New Orleans, by virtue of that differential from the distributor's net prices or difference in allowances?

A: No, it was not.

Q: It was not?

A: It was not hurt.

* * *

Q: Do you know whether you suffered an injury or not?

A: No I didn't suffer.

Counsel for Prosecution: Just a minute. We aren't so interested in getting your answer you are making as we are to find out whether or not you have the knowledge, yes or no, whether you know, and at that time I would like to make my objection.

The Witness: You want to know what, now? What is your question?

Counsel for Prosecution: I think Mr. Butterfield has a question pending.

Trial Examiner: Mr. Witness, the question is directed to your knowledge as to whether or not you know, not whether or not you did or did not, but whether or not you know whether you did or not. That calls for a yes or no answer.

The Witness: Whether I know I was injured, that is the question he asked me, was I injured.

Trial Examiner: Do you know whether or not you were injured? You know or you don't know. He will ask you a further question on that.

The Witness: My answer still was no.

Counsel for Prosecution: I think the witness misunderstands the question.

The Witness: You asked me if I was injured.

Counsel for Defendant: I ask if you know whether or not you were injured.

The Witness: Do I know whether or not I was injured?

Q: Yes.

A: The answer is I don't think I was injured. I don't see how I could be injured. I would say, whether I know whether I was injured or not?

Q: Yes, do you know?

A: I don't know as far as either way. I am not injured in any way. I mean, the question was asked, am I injured. We have, all the fellows are competitors.

Q: Who in your organization would know better than you whether you were injured or not?

A: Whether I was injured, in what way are you asking? Your question is whether or not I was injured?

Q: That is right.

A: No, I am not injured.

Counsel for Prosecution: I still move that answer be stricken and we have a yes or no answer to the question.

Trial Examiner: We will let the answer stand.

Counsel for Defendant: You may cross examine.

Trial Examiner: It is too complicated to get straightened out.

• • •

Trial Examiner: The question is whether or not you know; not whether or not you were injured, but whether or not you know whether or not you were injured.

Witness: Yes, I would know.

Counsel for Defendant: Were you so injured? What was the company, how was the company injured by virtue of the differentials?

Witness: We were not to my knowledge.

• • •

Q: I ask you to study this exhibit showing these sales and rebates, and I ask you if, by virtue of any of the differentials shown in rebates or commissions or differences on this sheet, whether you know if American Motor Specialties was injured competitively in its resale of the coil action parts of Moog Industries, Inc., for the years indicated?

A: No. The same as it was in the other case.

Q: And by "no" you mean that you were not injured competitively by reason of the differentials shown on this sheet.

• • •

Q: Do you know whether you were competitively injured?

A: No, I don't believe I have been.

Q: By that you mean that you have not been competitively injured?

A: No.

• • •

Counsel for Defendant: I will ask you to examine this chart and tell me whether or not you know whether Sapiro Auto Parts Company was or was not competitively injured by virtue of the differentials in rebates shown on that chart?

Counsel for Prosecution: We have the same objection we have had heretofore.

Trial Examiner: Objection overruled.

Witness: As far as I can say, we in Sapiro Auto Parts Company more or less mind our own business, and we are not interested in what Clinton Square Auto Parts gets, or what they do, because there seems to be enough business in the territory for all of us, and we all get our share of the business, and we all make our profit.

Counsel for Defendant: Do you know whether or not you were injured competitively by virtue of these differentials?

Witness: Not as far as I know, no.

Q: By "not as far as you know," you mean that you were not injured competitively?

A: That is right.

* * *

April 29, 1955.

Petition to United States Court of Appeals, 8th Circuit to Review Decision and Order of Federal Trade Commission (Filing Date June 27, 1955).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

Civil No. 15370

Moog Industries, Inc., Petitioner,

vs.

Federal Trade Commission, Respondent.

PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION.
(Filed June 27, 1955.)

Comes now Petitioner Moog Industries, Inc., a corporation, and presents this petition to review an order of the Respondent Federal Trade Commission made and entered on the 29th day of April, 1955, in a proceeding before said body entitled "In the Matter of Moog Industries, Inc., a corporation, Docket No. 5723" and in support respectfully show:

I.

Nature of Proceeding to Be Reviewed.

1. On December 20, 1949, the Respondent issued a Complaint charging in substance that Petitioner has discriminated in price between different purchasers, and that

such acts may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy or prevent competition in violation of Subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 13), as amended by the Robinson Patman Act approved June 19, 1936.

2. Petitioner filed its motion for a bill of particulars January 16, 1950, which was denied by the Respondent on January 20, 1950.

3. Petitioner filed its answer February 13, 1950, and its amended answer by leave on June 20, 1950, specifically denying any violation of law as charged in the Complaint.

4. Hearings were had before Honorable Earl J. Kolb, Respondent's duly appointed Hearing Examiner, and testimony and other evidence was offered and received on behalf of the Respondent and on behalf of Petitioner from time to time thereafter.

Counsel for the Commission in support of the Complaint introduced the testimony of three officers of the Petitioner, four automotive parts jobbers located at New Orleans, Louisiana, four automotive parts jobbers located at Memphis, Tennessee, one automotive jobber located at Greenwood, Mississippi, the presidents of two incorporated groups of automotive parts jobbers and two Federal Trade Commission Accountants, together with Commission Exhibits Nos. 1 to 79 inclusive.

At the conclusion of the evidence in support of the Complaint on March 4, 1952, Petitioner's oral motion to dismiss the Complaint was denied. Subsequently on June 2, 1952, Petitioner filed its written motion to dismiss the Complaint which was overruled June 4, 1952.

Petitioner filed its second motion for a bill of particulars on June 2, 1952, which was denied June 4, 1952.

Thereafter the Petitioner in opposition to the Complaint introduced the testimony of three officers of Petitioner, the Secretary-Treasurer of an incorporated group of automotive parts jobbers, five automotive parts jobbers from Denver, Colorado, four automotive parts jobbers from Dallas, Texas, three automotive parts jobbers from New Orleans, Louisiana (who had previously testified for the

Commission), two automotive parts jobbers from Memphis, Tennessee (one of whom had previously testified for the Commission), one automotive parts jobber from West Orange, New Jersey, one from Brooklyn, New York, one from New Brunswick, New Jersey and one from Newark, New Jersey, together with Respondent's Exhibits 5 to 26 inclusive. All of these witnesses testified that they had not been injured by the pricing practices of Moog Industries which was the subject of the Complaint. In addition counsel for the Commission entered into a stipulation with your Petitioner that if additional jobbers were called upon to testify "their testimony would be the same as that of the witnesses previously called," to the effect that they had not been competitively injured or damaged by Moog's pricing system nor did any of the witnesses called by the Commission testify that they had been competitively injured or damaged by the pricing system of Moog Industries.

In the course of taking evidence in its behalf your Petitioner filed its motion June 23, 1953, to require Commission Counsel to make certain elections from the mass of evidence which they had introduced, which would be relied upon to constitute the Commission's case. This motion was denied by the Hearing Examiner, appeal was taken from this ruling and on July 31, 1953, the Commission issued its order denying the appeal.

Hearings were concluded on September 16, 1953, and on order of the Hearing Examiner on February 19, 1954, the proceeding was closed.

5. On March 5, 1954, the Hearing Examiner made the Initial Decision and Order filed March 8, 1954, finding that your Petitioner has discriminated in its prices in violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Section 13, Title 15, U. S. Code) and order your Petitioner to cease and desist therefrom.

6. Appeal was duly made to the Commission and the matter was briefed and argued by both sides; on April 29, 1955, the Respondent Commission issued and filed its opinion and order overruling Petitioner's exceptions and

denied the appeal of Petitioner and issued its conclusion, its order to cease and desist, together with the dissenting opinion of Lowell B. Mason.

7. A copy of the Initial Decision and Order of the Hearing Examiner, the opinion of the Federal Trade Commission and its final Order with the dissenting opinion of Commissioner Mason are annexed hereto, marked Exhibit A and made a part hereof.

II.

Statute and Facts Upon Which Venue Is Based.

This Court has venue and jurisdiction by virtue of Section 21 of the Clayton Act (Section 21, Title 15, U. S. Code), which provides in part as follows:

"If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States Court of Appeals within any Circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order. . . ."

"Any party required by such order of the Commission or board to cease and desist from a violation charged, may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

"The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.".

The Facts.

1. Petitioner, Moog Industries, Inc., has its principal office and manufacturing plant in St. Louis, Missouri, within this Eighth Circuit.

2. The Petitioner is in the business of manufacturing, selling and distributing automotive replacement parts to purchasers located in all States of the United States and District of Columbia; some of the parts so sold are purchased by Petitioner for resale, the balance being manufactured in its own plant. It is now and has for many years prior to the effective date of the Robinson-Patman Act (June 19, 1936) been continuously engaged in this business. Petitioner in the conduct of its business has been and is now engaged in competition with other corporations, firms and persons who are manufacturing, selling and distributing similar automotive replacement parts in Interstate Commerce to purchasers in the various States of the United States and the District of Columbia.

Petitioner separates its various automotive replacement parts into three classifications or lines as follows:

(a) Coil Action Parts;

(b) Leaf Springs, Coil Springs and Chassis Parts;

(c) Piston Rings.

The above types of automotive replacement parts represents different items of varying design and function and which are used in the repair and maintenance of many various makes and models of automobiles and trucks.

Similar automotive replacement parts are manufactured and sold by various other manufacturers and distributors, including all of the automobile and truck manufacturers themselves. Petitioner's role in the automotive replacement parts industry is that of the producer and seller of an insignificant percentage of the total annual production

of the automotive replacement parts industry, and petitioner's function is characteristically that of a small national business operation. It sells less than one per cent (1%) of the total sales in the replacement parts industry, its total average annual sales over the period involved herein being only approximately Four Million Four Hundred Thousand Dollars ($4,400,000.00).

One jobber might purchase from petitioner only one item of one type for one make of automobile or a number of items of several types for a number of makes and models. Another jobber might purchase entirely different items of another type for other makes or models. Some jobbers might purchase a portion of replacement parts in one classification or line while other jobbers purchase a portion of another classification or line. Jobbers are not compelled to and do not necessarily purchase all the various types of parts in any of the three classifications or lines. Some of the replacement parts in each of the three lines are sold by Petitioner in kits or packages which contain a complete unit installation of replacement parts for certain makes and models of cars. A jobber has his choice according to his own needs and requirements of purchasing one or more items, types, kits, or lines for one or more of the various makes and models of automobiles and trucks from either the Petitioner or from the dozens of other producers of similar products.

The system of volume rebates used by Petitioner and which was the subject matter of the Commission's Complaint herein is similar to the systems that prevail and are used generally throughout the automotive services industry by independent manufacturers of automotive replacement parts which include your Petitioner's competitors.

Your Petitioner also sells its automotive replacement parts to jobbers, who are designated by it as distributors, who in turn resell such parts to other jobbers as well as to garages, service stations and fleet owners.

From time to time Petitioner issued its price lists on the various items in each of the three lines, which were applicable to all of its customers.

Petitioner also issued from time to time suggested resale price lists for use by its distributors and dealers in the resale of replacement parts. Petitioner's plan of rebates which applied to all purchasers provided for annual volume rebates based on the amount of annual purchases in any one line. The volume rebates on the Coil Action line and the Piston Ring line has been a retroactive volume rebate in substantially the same amount since 1947. Prior to July 1, 1949, Petitioner allowed a non-retroactive rebate on its Leaf Spring line, but subsequent thereto has granted a retroactive volume rebate. These rebates based on volume of annual purchases of the respective three lines are as follows:

Coil Action Parts:

New Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$15,000 to $17,499	14%
$1,000 to $4,971	5%	17,500 to 19,999	15%
5,000 to 7,499	7½%	20,000 to 22,499	16%
7,500 to 9,999	9%	22,500 to 24,999	17%
10,000 to 12,499	10%	25,000 to 27,499	18%
12,500 to 14,999	12%	27,500 and over	19%

Piston Ring Line:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $2,000	None	$ 9,000 to $ 9,999	13%
$2,000 to $2,999	2%	10,000 to 11,999	14%
3,000 to 3,999	5%	12,000 to 14,999	15%
4,000 to 4,999	7%	15,000 to 17,999	16%
5,000 to 5,999	9%	18,000 to 20,999	17%
6,000 to 6,999	10%	21,000 to 24,999	18%
7,000 to 7,999	11%	25,000 to 29,999	19%
8,000 to 8,999	12%	30,000 and over	20%

Leaf Spring Line, Including Coil Springs and Chassis Parts

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$11,000 to $14,999	11%
$1,000 to $2,999	5%	15,000 to 19,999	12%
3,000 to 4,999	7%	20,000 to 27,499	13%
5,000 to 7,999	9%	27,500 to 34,999	14%
8,000 to 10,999	10%	35,000 and over	15%

In addition to the above volume rebate, the Petitioner allowed to its distributors who resold to other jobbers a ten per cent (10%) warehousing and redistributing commission, provided the combined earnings of the warehousing and redistributing commission plus the volume rebate on any line in a given year could not exceed the earnings figured at the maximum rebate for that particular line.

All purchasers were granted and received rebates according to the bracket applicable to their annual purchases.

In addition Petitioner allowed to all purchasers a uniform discount of two per cent (2%) for cash payment by the 10th of the month following month of purchase, which discount is also prevalent throughout the industry.

III.

The Relief Prayed.

Petitioner respectfully prays this Court for relief as follows:

1. That a copy of this petition be forthwith served upon the Respondent Federal Trade Commission, and that said Commission be required forthwith to certify and file in this Court a transcript of the entire record in the proceeding entitled as aforesaid, "In the Matter of Moog Industries, Inc., a Corporation," Docket No. 5723, including all the evidence taken, the Initial Decision of the Hearing Examiner, his Order to Cease and Desist, together with the Opinion of the Commission denying Petitioners' Appeal, the Final Order of the Commission and the Dissenting Opinion of Commissioner Mason.

2. That this Court review the said proceedings and the Commission's Order to Cease and Desist, and enter an Order setting aside the Commission's findings and conclusion, its Opinion, together with its Order to Cease and Desist, or in the alternative, to modify said Order.

3. And that this Court grant Petitioner such other and further relief as to the Court may seem proper and just.

IV.

Points Upon Which Petitioner Intends to Rely.

1. Petitioner contends that the Commission's findings and conclusions are not supported by reliable, probative or substantial evidence as required by Section 7 (c) of the Administrative Procedure Act (Section 1006, Title 5, U. S. Code).

2. That the findings are incomplete and misleading in that they do not include additional material facts which were established by substantial and uncontradicted evidence.

3. That the Commission's conclusion is erroneous as a matter of fact and as a matter of law in that it is not supported by reliable, probative and substantial evidence upon the whole record.

4. That the Commission's Order to Cease and Desist is erroneous and illegal in that it is not supported by findings of fact which are supported by reliable probative and substantial evidence, but, on the contrary, the Order to Cease and Desist is based upon presumptions and inferences of injury to purchaser competitors which presumptions and inferences were rebutted by substantial and uncontradicted testimony.

5. That said Order is based upon findings and conclusions which are mere inferences based upon inferences contrary to established fundamental law.

6. The Commission erred in holding that there was a "reasonable possibility" that competition may be adversely affected by the rebates granted in that there was no basis

whatsoever for such a holding on the whole record, but on the contrary, all the evidence in the record showed no damage or injury to competition at any time. Numerous witnesses engaged in the day-to-day sale of these products attested to this fact of no injury to competition by reason of volume rebates. No witness testified to any such injury. An Order to Cease and Desist issued on such evidence is contrary to established fundamental law as well as contrary to the wording, the meaning and intent of the statute involved.

7. The record evidence fails to prove the violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act (Section 13, Title 15, U. S. Code), as found and concluded by the Commission in that there is no reliable, probative and substantial evidence

(a) that any two named purchasers of petitioner's products were competitively engaged in the resale of the same type of product to the same class of customers in the same marketing area,

(b) that petitioner's pricing practices have caused any actual injurious effects upon competition between purchasers of petitioner's products, or

(c) from which a reasonable inference may be drawn that, as the result of petitioner's pricing practices, any substantial injurious effects upon competition between purchasers of petitioner's products are reasonably probable.

8. The Commission erred in denying Petitioner's two motions for a bill of particulars, in that the allegations of the Complaint are stated in the general words of the statute, containing no details or information as to the exact nature of the charges Petitioner must defend, and were contrary to Section 5 (a) of the Administrative Procedure Act [Section 1004 (a), Title 5, U. S. Code], thereby depriving Petitioner of due process of law as provided by the Fifth Amendment to the Constitution of the United States and contrary to practices of the Commission.

9. The Commission erred in denying Petitioner's motion to require counsel for the Commission to make certain elections from the mass of evidence of a reasonable number of individual sales transactions in any certain item showing certain purchasers favored at a certain time in a certain market area, which would be relied upon to constitute the Commission's case. This mass of evidence as a whole showed the system of rebates used by Petitioner, but did not establish any separate individual sales transaction wherein Petitioner sold the same type of replacement parts at different prices to different jobber purchasers who were competing in the sale of that particular type of automotive parts during the same specified time in the same market area. There was thereby placed upon Petitioner an insurmountable burden of analyzing and breaking down this mass of general evidence which would require thousands of man-hours by high-priced accountants and involving exorbitant and needless expense beyond Petitioner's financial ability to meet and thus Petitioner was deprived of the benefit of the due process of law as required by the Fifth Amendment to the Constitution of the United States.

10. If the Order to Cease and Desist is not erroneous and invalid for the foregoing reasons stated in Points 1 to 8, then said Order is invalid because it is too broad in scope and exceeds the authority of the Commission as follows:

a) It should not have included "piston rings" since there is no evidence of discrimination in prices as to that item.

b) It should not have included the words "and other related items" as there is no evidence in the record of other related items.

c) Its provisions were not limited to price discrimination where the effect was injury to the secondary line competition, as the evidence in the case was directed solely to this secondary line. Price discrimination so as to cause injury to the secondary line competition means injury at the distributor or jobber level.

d) The Order was not limited by its provisions to instances of price discrimination in the sale of specific types of replacement parts of like grade and quality to purchasers competing in the resale of such specific types of like grade and quality of automotive replacement parts.

11. The Order to Cease and Desist contains no guide or yardstick by means of which Petitioner can determine the lawfulness or unlawfulness of its pricing practices.

12. Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act (Section 13, Title 15, U. S. Code) as construed and applied by the Federal Trade Commission in this proceeding is contrary to constitutional standards of definiteness and reasonableness thereby denying due process of law to Petitioner under the Fifth Amendment to the Constitution of the United States.

Wherefore, your Petitioner prays for the relief set forth in Section III above.

Respectfully submitted,

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TRANSCRIPT OF EVIDENCE AND PROCEEDINGS BEFORE THE FEDERAL TRADE COMMISSION.

In the Matter of MOOG INDUSTRIES, INC. (A Corporation)	Docket No. 5723 United States Court House, 1114 Market Street, St. Louis, Mo.

Tuesday, June 20, 1950.

Before Honorable Earl J. Kolb, Trial Examiner.

Appearances:

Elon P. Schrup, and James E. Corkey, Counsel Supporting the Complaint.

Edwin S. D. Butterfield, Counsel for Moog Industries, Inc.

Respondent, Moog Industries, Inc., in response to a subpoena duces tecum, produced a number of documents (Tr. Part 1, Page 2).

The Trial Examiner granted leave to withdraw the Answer filed by Respondent and granted leave to file an Amended Answer (Part 2, Page 5). The Trial Examiner stated that in view of the facts that the Amended Answer did not contain certain admissions which appeared in the original Answer, with reference to statements in Paragraphs 1, 2, and 3 of the Complaint, that he would take up with counsel each of those paragraphs and determine the extent to which those particular paragraphs were admitted. The Respondent, through counsel admitted the statement appearing in Paragraph 1 of the Complaint that Respondent, Moog Industries, Inc., formerly titled St. Louis Spring Company, is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business at 6650 Easton Avenue, St. Louis, Missouri (Part 2, Page 6).

The respondent admitted Paragraph 2 of the complaint, which stated that "respondent is now, and for several years

last past has been, engaged in the business of the manufacture, sale and distribution of automotive products and supplies to different purchasers of the same, located in the various States of the United States and in the District of Columbia. Said products and supplies are sold by the respondent for use, consumption or resale within the United States and the District of Columbia, and respondent causes said products and supplies, so sold, to be shipped and transported from the State or States of location of its places of business to the purchasers thereof, located in States other than the State or States wherein said shipment or transportation originated" (Part 2, Page 6).

Respondent maintains and at all times mentioned herein, has maintained a course of trade and commerce in said products and supplies, among and between the States of the United States and in the District of Columbia, existed (Part 2, Page 7).

Respondent admitted paragraph 3 with the exception of the statement that they were engaged in "substantial competition", as the term "substantial competition" applies to the competition in the entire industry.

Respondent now admits paragraph 3 as follows:

"Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been, engaged in active competition with other corporations, partnerships, firms, and individuals manufacturing, selling, and distributing, comparable automotive products and supplies in commerce to purchasers of the same in manner and method and for purposes as aforestated. Many of said purchasers and many of the aforesaid purchasers from the respondent are comparatively engaged each with the other."

(Pages 7, 8.)

ANTON M. GOETZ, called as a witness for the Commission, testified as follows:

Direct Examination.

My name is Anton M. Goetz, residing at 6034 Odell Street, St. Louis, Missouri. I am Secretary and Controller of Moog Industries, Inc., and have been employed by them for ten years, and held the position of Secretary for that period of time. Prior to being employed by Moog Industries, I was employed with S. D. Leidesdorf & Company, Certified Public Accountants, at St. Louis, Missouri. As Secretary, I watch over all cash outlays, sign checks, am on the Financial Board and on the Board of Directors. I discuss all sales policies and advise with others to arrive at the proper conclusion. I handle all tax problems and anything that a controller similarly situated would do (Part 2, Page 9). I am also in administrative charge of office help and have charge of taking care of all records and documents of Moog Industries, Inc. I am making return on this subpoena duces tecum, addressed to Moog Industries, Inc., and the material so presented was obtained by various members of my staff at my direction and supervision (Part 2, Page 10).

I have a true copy of all contract forms used by respondent in connection with the sale of goods during the calendar years 1947, 1948, and 1949, and including, but not limited to, a distributors' franchise and distributors' companion agreement, a C. P. Wholesaler's agreement, a jobber agreement, and an A. R. J. jobber contract. These documents, so referred to, were marked "Commission's Exhibits 1, 2, 3, 4A, 4B, 5, 6, 7, 8, 9, 10, 11, 12, and 13."

Commission's Exhibit No. 1 is our agreement with the distributor on the sale of our products to him. The figures in the lower left hand corner of this exhibit "12-49" refer to a new franchise agreement that was written up by us to be sent to our customers about the first of the year, and refers to the date the form was printed (Part 2, Page 11).

Commission's Exhibit 2 is an agreement which becomes a part of our distributors' franchise agreement,

marked "Commission's Exhibit 1". It is a supplementary agreement and is not necessarily a part and parcel of Commission's Exhibit 1 (Part 2, Page 12). In some instances Commission's Exhibit 2 does supplement and modify the terms of Commission's Exhibit 1. In the lower left hand column of Commission's Exhibit 2 the figures 4-30-50 indicate the date of printing, and was put into effect after that date with some of our customers. A similar form was used prior to April 30, 1950, but there are some modifications in Exhibit 2 that do not appear in Commission's Exhibit 3. Commission's Exhibit 3 is an agreement printed December 3, 1949, and was used after that date with some of our customers in connection with redistribution of our product (Part 2, Page 13). On April 30, 1950, Commission's Exhibit 2 superseded Exhibit 3.

Commission's Exhibit 4A and 4B in the form of a letter to all Moog distributors, dated August 12, 1949, is an amendment to our franchise agreement with our distributors that has been marked "Commission's Exhibit 6" (Part 2, Page 14).

Commission's Exhibit No. 5 is a letter dated July 22, 1949, was sent to all of our distributors as an amendment to our franchise agreement of November, 1948, which letter was later amended by our letter of August 12-49 (Comm. Exhibit 4A and 4B) (Part 2, Page 15). Commission's Exhibit 6 is a distributor's franchise agreement that went into effect around November, 1948, and which was later amended by our letters to our distributors of July 22nd and August 12, 1949, being Commission's Exhibit 5 and Commission's Exhibit 4A and 4B (Part 2, Page 15).

Commission's Exhibit 6 is an original copy with one of our customers as we had no form copy that had not been previously used. It is similar to the form used by all other customers except a customer named O. C. Y.

Commission's Exhibit 7, purporting to be a distributor's franchise, is an agreement with our customers that was printed in April, 1948, which changed the terms of a previous agreement in some respects. That previous

agreement was dated November, 1947, and is Commission's Exhibit 8.

Commission's Exhibit 7 was a copy of a contract effective for that period, and as we had no unused form in our file, we have supplied one of our original papers (Part 2, Page 16). Commission's Exhibit 7 was superseded by Commission's Exhibit 6.

Commission's Exhibit 8 is a distributor's franchise agreement and is a copy of an agreement we had in effect with Row Auto Parts Company in that period, and the printed date is November, 1947, and was for the period beginning February 12, 1948, in that case. It was used approximately for the year 1948 until amended by Commission's Exhibit 7, and is supplied as a typical distributor's franchise contract, as we had no blank forms for that particular period (Part 2, Page 17). In other words Commission's Exhibit 8, was the form used in the period between November, 1947, and April, 1948.

Commission's Exhibit 9 represents a consignment agreement with our distributors in connection with the sales of our piston rings on a consignment basis and a replenishment of the consigned stock after sale. The date of printing was January, 1950. It was a reprinting of a document which we had printed in May, 1945, without change, and this distributor's consignment agreement was used in connection with consignment sales of piston rings during the period starting in May, 1945.

Commission's Exhibit 10 is a wholesaler's agreement between our customers and their customers in connection with the sale of our products (Part 2, Page 18), and with our approval is used between our wholesale customers and their customers. This particular type of agreement was used during the period January 1, 1947 to December 21, 1949 (Part 2, Page 19).

Commission's Exhibit 11 is another jobber agreement between our customer and one of their classes of customers and is entered into with the consent of Moog Industries, Inc. It was printed around the date of April 30, 1950, to be used in conjunction with Commission's Exhibit 2 (Part 2, Page 19) which is the warehousing and redistributing plan (Part 2, Page 20). The ware-

housing and redistributing plan had been put into effect in December of 1949 generally, but there were a few exceptions prior to that date, but December, 1949, was the first time we found it necessary to use printed forms, because in lieu of this form (Comm. Exhibit 11) we used Commission's Exhibit No. 12 (Part 2, Page 20).

Commission's Exhibit 12 is an agreement between our customers and their customers, approved by us, relating to the sale of our products and it was used by the few warehousing and redistribution plan customers that we had prior to December, 1949; and it was also generally used for our customers as a sales aid in tying customers of theirs to them without a warehousing and redistributing plan having been effected. Commission's Exhibit 12 was in use either in the latter part of 1946 or the early part of 1947 (Part 2, Page 21). It was used up until December 1949, when it was superseded by Commission's Exhibit 11 (Part 2, Page 21).

Commission's Exhibit 13 is an A. R. J. jobber contract and is an agreement between our customer and one of their classes of customers, in regard to the purchase of piston rings by the one customer from the other. The initials "A. R. J." mean "Associate Ring Jobber". It was first used in July, 1947 (Part 2, Page 22).

Commission's Exhibit 14 is the distributor's franchise agreement between our customers and ourselves in relation to the sale of our products, and was in effect from about March, 1945, until November, 1947 (Part 2, Page 22).

Commission's Exhibit No. 8 was the form which superseded the distributor's franchise, marked "Commission's Exhibit 14".

The foregoing represent all the various types of form contracts which were used by Moog Industries, Inc., in connection with the sale of its products during the period January 1, 1947, to December 21, 1949, in the cases in which our name appeared on the contract. For instance, there is a contract form between a class of our customers and one of their customers, in regard to consignment of piston rings by our customer to one of their customers. This was used in connection with Commission's Exhibit

9. It was known as a Moog specialist's contract. This contract was placed in the hands of some of Moog's customers and was used by them in connection with sales of Moog Products to their customers on a consignment basis. Copies of these contracts were forwarded by our customers to us and were kept in Moog's files (Part 2, Page 24).

The foregoing were all the contract forms used during this period by Moog, although we may have had a similar agreement to Commission's Exhibit 12 in use prior to that one. The primary use was as a sales aid to our customer (Part 2, Page 25).

Thereupon, Commission's Exhibits 1, 2, 3, 4A, 4B, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 were offered and received in evidence (Part 2, Page 25).

Commission's Exhibit 15 is a Moog catalogue and is typical of the various catalogues used during the calendar years 1947, 1948, and 1949, and the price lists contained in that exhibit are typical of the various price lists used in connection with merchandising of Moog Products during those years. The essential difference between Commission's Exhibit 15 and any other catalogue or price list, used in that period, would merely be that certain items have been added as new cars came on the market and a few items were deleted because there were no longer any calls for them, and include price changes that may have occurred (Part 2, Page 26). Moog may issue price changes at any time. The scheme of price list uses a different system of colors—a white price list, a yellow price list, a buff price list, a pink price list, and a blue price list—and these have remained constant during the years 1947 through 1949, except the leaf spring line, in connection with which we did not have certain of these colored price lists. In the leaf spring line we merely have three different colored price lists—a yellow, a green and a blue price list—and they remained constant through the years 1947 through 1949 (Part 2, Page 27).

Thereupon Commission's Exhibit 15 was offered and received in evidence (Part 2, Page 28).

Commission's Exhibit 16 is an advertising pamphlet issued by our promotional department to explain to our customers the manufacturing of our leaf spring.

Commission's Exhibit 17 is an advertising pamphlet, similar to Commission's Exhibit 16, but it relates to our coil action parts. (Part 2, Page 28).

Commission's Exhibit 18 is an advertising pamphlet relating to the piston ring line, explaining the manufacture of piston rings.

Thereupon Commission's Exhibits 16, 17, and 18 were offered and received in evidence (Part 2, Page 29).

Commission's Exhibit 16, relating to the spring division of Moog Industries, was published in 1950 and replaced a previous pamphlet of similar nature which I believe was published in 1948.

Commission's Exhibit 17, relating to the coil action division was published and distributed in 1949 and Commission's Exhibit 18, relating to piston rings was published in 1948 (Part 2, Page 29). They were generally distributed to the trade.

Commission's Exhibits 19A through 19F refer to parties designated under Metropolitan Automotive Wholesalers Co-Operative, Inc.

Commission's Exhibit 19A is a distributor's franchise agreement between Moog Industries, Inc., and Metropolitan Automotive Wholesalers Co-Operative, Inc., dated June 1, 1948, executed by Abraham Lonoff, President and by A. A. Apple, and was effective between it and ourselves relating to the sale of our coil action line to them in the period from December 1, 1947, until the contract was changed (Part 2, Page 31). While this contract is dated August 25, 1948, for accounting purposes we have to establish either a fiscal or calendar year to all of our customers to which we apply our merchandise bonus, it so happens that in this particular case the year began with December 1, 1947, and ended November 30, 1948, so the contract was considered effective by Moog and that company although it was not executed until August, 1948. While Page 4 of this contract indicates that Shackles, tierod ends and kingbolt sets are checked as products to be purchased, they may have purchased a few of those sets out of this contract, but the amount was small, and this contract would cover purchase of those parts regardless of amount. If we had any contract executed by the individual mem-

bers of Metropolitan Automotive Wholesalers Co-Operative, it was in error, (Part 2, Page 32).

Commission's Exhibit 19B is a distributor's merchandise agreement between Moog Industries, Inc., and Metropolitan Automotive Wholesalers Co-Operative, Inc., and is one which we received from them after we changed our contract in November of 1948, and it also relates to the sale of our coil action parts to them for the fiscal year 1948 to November 30, 1949 (Part 2, Page 33).

Commission's Exhibit 19C is a letter from Metropolitan Automotive Wholesalers Co-operative, Inc., to Moog Industries, Inc., received by us April 22, 1948.

Commission's Exhibit 19D is a letter dated June 25, 1948, from Moog Industries, Inc., to Metropolitan Automotive Wholesalers Co-operative, Inc., dictated by our Mr. Bushyhead, in regard to their franchise agreement (Part 2, Page 33).

Commission's Exhibits 19E and 19F is a letter to them and a carbon copy of a letter, dated December 21, 1949, explaining the changes in our contract for 1950, in our franchise agreement for 1950 (Part 2, Page 34). There were no other documents in our files relating to Metropolitan Automotive Wholesalers Co-operative, Inc., during the period July 1, 1938, to December 21, 1949.

Thereupon Commission's Exhibits 19A through 19F, inclusive, were offered and received in evidence (Part 2, Page 34).

We have no documents, contracts, franchises, or correspondence with Automotive Group Buyers, Inc., because the period of time in which they operated with us was such that we destroyed all correspondence and documents that we may have had (Part 2, Page 35).

ANTON M. GOETZ, testified further as a witness for the Commission:

Papers in connection with Cotton States, Inc., were marked Commission's Exhibits 20A, 20B, 20C, 20D, 20E, 20F, 20G, 20H, 20I, 20J, 20K, 20L, 20M, 20N, 20O, 20P,

20Q, 20R, 20S, 20T, 20U, 20V, 20W, 20X, 20Y, and 20Z, 20Z-1, 20Z-2, 20Z-3, 20Z-4, 20Z-5 (Part 2, Page 37).

Thereupon Commission's Exhibits Numbers 20A, 20B, 20C, 20D, 20E, 20F, 20G, 20H, 20I, 20J, 20K, 20L, 20M, 20N, 20-O, 20P, 20Q, 20R, 20S, 20T, 20U, 20V, 20W, were offered and received in evidence; and thereupon Commission's 20X, to 20Z-5 were returned to the witness (Part 2, Page 39).

Papers relating to Mid-South Distributors were marked Commission's 21A, 21B, 21C, 21D, 21E, 21F, 21G, 21H, 21J, 21K, 21L, 21M, 21N, 21-O, 21P, 21Q, 21R, 21S, 21T, 21U, 21V, 21W, 21X, 21Y, and 21Z, 21Z-1, 21Z-2, 21Z-3, 21Z-4, 21Z-5, 21Z-6, 21Z-7, 21Z-8, 21Z-9, 21Z-10, 21Z-11, 21Z-12, 21Z-13, 21Z-14, 21Z-15, 21Z-16, 21Z-17, 21Z-18, 21Z-19, 21Z-20, 21Z-21, 21Z-22, 21Z-23, 21Z-24, 21Z-25, 21Z-26, 21Z-27, 21Z-28, 21Z-29, 21Z-30, 21Z-31, 21Z-32, 21Z-33, and 21Z-34. There are no contracts with this company in our files. We have checked all of our files and can find none for the years 1947, 1948, and 1949 (Part 2, Page 39). Thereupon Commission's Exhibits 21A through 21Z-34, were offered and received in evidence (Part 2, Page 41).

Documents relating to Mid-West Warehouse Distributors, Inc., marked Commission's Exhibits 22A, 22B, 22C, 22D, 22E, 22F, 22G, 22H, 22I, 22J, 22K, 22L, 22M, 22N, 22-O, 22P, 22Q, 22R, 22S, 22T, 22U, 22V, 22W, were offered and received in evidence (Part 2, Page 42).

Thereupon documents relating to Ozburn, Crow & Yantis Company, marked Commission's Exhibits 23A, 23B, 23C, 23D, 23E, 23F, 23G, 23H, 23I, 23J, 23K, 23L, 23M, 23N, 23-O, 23P, 23Q, 23R, 23S, 23T, 23U, 23V, 23W, 23X, 23Y, and 23Z, 23Z-1, 23Z-2, 23Z-3, 23Z-4, 23Z-5, 23Z-6, 23Z-7, 23Z-8, 23Z-9, 23Z-10, 23Z-11, 23Z-12, 23Z-13, 23Z-14, 23Z-15, 23Z-16, 23Z-17, 23Z-18, 23Z-19, 23Z-20, 23Z-21, 23Z-22, 23Z-23, 23Z-24, and 23Z-25 were offered and received in evidence (Part 2, Page 43).

Thereupon documents relating to Automotive Parts Distributors, Inc., were marked Commission's Exhibits 24A, 24B, 24C, 24D, 24E, 24F, 24G, 24H, 24I, 24J, 24K, 24L, 24M, 24N, 24-O, 24P, 24Q, 24R, 24S, 24T, 24U, 24V, 24W, 24X, 24Y, and 24Z, 24Z-1, 24Z-2, 24Z-3, 24Z-4, 24Z-5, and 24Z-6 were all offered and received in evidence, ex-

cept Commission's Exhibits 24Z-5 and 24Z-6 which were not introduced in evidence by the Commission and were returned to the witness (Part 2, Page 44).

Mr. Goetz then produced documents relating to Warehouse Distributors, Inc., marked Commission's Exhibits 25A, 25B, 25C, 25D, 25E, 25F, 25G, 25H, 25I, 25J, 25K, 25L, 25M, 25N, 25-O, 25P, 25Q, 25R, 25S, 25T, 25U, 25V, 25W, 25X, and 25Z, and 25Z-1, 25Z-2, 25Z-3, 25Z-4, 25Z-5, 25Z-6, 25Z-7, 25Z-8, 25Z-9, 25Z-10, 25Z-11, 25Z-12, 25Z-13, 25Z-14, 25Z-15, and 25Z-16 were offered and received in evidence (Part 2, Page 46).

Mr. Goetz then produced documents relating to Southwestern Warehouse Distributors, marked Commission's Exhibits 26A, to 26M, inclusive, which were offered and received in evidence (Part 2, Page 47).

Mr. Goetz then produced documents relating to Automotive Southwest, Inc., marked Exhibits 27A, 27B, 27C, 27D, 27E, 27F, 27G, 27H, 27-I, 27J, 27K, 27L, 27M, 27N, 27-O, 27P, 27Q, 27R, 27S, 27T, 27U, 27V, which were offered and received in evidence (Part 2, Page 48).

Mr. Goetz then produced documents relating to Ark-La-Tex Warehouse Distributors, Inc., marked Commission's Exhibits 28A, 28B, 28C, 28D, 28E, 28F, 28G, 28H, and 28-I, which were offered and received in evidence.

Thereupon Mr. Goetz produced documents relating to Six States Associates, marked Commission's Exhibits 29A, 29B, 29C, 29D, 29E, 29F, 29G, 29H, 29-I, 29J, 29K, 29L, 29M, 29N, 29-O, and 29P, which were offered and received in evidence (Part 2, Page 50).

It was understood that Respondent's failure to tender objections to Commission's Exhibits 19A through 29P was not to be construed as any waiver or estoppel of respondent's rights under the issues in its amended answer as to the jurisdictional defense (Part 2, Page 50).

Thereupon Commission's Exhibits, 30A, 30B, 30C, 30D, 30E, 30F, 30G, 30H, 30-I, 30J, 30K, 30L, 30M, 30N, 30-O, 30P, 30Q, 30R, 30S, 30T, 30U, 30V, 30W, and 30X were marked for identification.

I am familiar with this document. It was prepared by us and a copy of which was forwarded to our attorney,

Mr. Butterfield. It contains a list of all the group buying organizations with which Moog Industries has done business, together with the members of those several groups who are purchasers from Moog Industries, Inc. At the top of most of these sheets is the name of the group organization. Below that there is a heading entitled "members" and then a further listing of names under that heading. These members, except the ones which are preceded by a star, are purchasers from Moog Industries, Inc., and are group members from whom we receive group purchase orders for their requirements, with two exceptions. These exceptions are Southwest Automotive Distributors, of Los Angeles, California, and Southern California Jobbers, Inc., of Los Angeles, California. These latter names refer to the pages identified as Commission's Exhibits 30S, 30Q, and 30R (Part 2, Pages 51, 52). The members of Southern California Jobbers, Inc., and of Southwest Automotive Distributors order from Moog on their own regular purchase order forms. The other jobber members of the several group-buying organizations listed in this exhibit ordered from Moog on purchase order forms bearing the name of the group organization, but these order forms, however, are submitted by the individual members of the group. Moog makes shipments pursuant to the order forms submitted by the individual members of the several groups and such shipments are made to members or their customers. So far as I know, these group organizations do not have any warehouses, although I believe there are some who are considerin warehouses. During the period between June 19, 1936 and December 21, 1949, I know of none to whom shipment was made to their warehouses, to the best of my knowledge (Part 2, Page 53). There are some members who themselves warehouse the stock for their branches and from which the branches are being supplied. As far as I know, during the period between June 19, 1936 and December 21, 1949, none of the group-buying organizations had a warehouse for the group itself. When we bill for the purchases made by the several members of a group, we break down the purchases, showing what each member has purchased during the course of a month. That is done for accounting convenience and we send that bill to

group headquarters with a summary statement showing their total purchases. Upon their request we also furnish periodically a summary of the purchases made by the several members of the various groups with whom we deal (Part 2, Page 54).

Q. Mr. Goetz, making specific reference to Metropolitan Automotive Wholesalers, a list of whose members appears upon the document pages identified as 30G and 30H, is it true that in selling to the members of this group shipments were made to the addresses which immediately follow the names of the members, as they are set forth on these pages?

A. Not in all cases because it is possible that the shipments were made to the main office of the member and the shipments then transferred to the branch stores on a basis of their needs.

Q. In other words, Mr. Goetz, again being particular reference to the member known as American Motor Specialties Company, there are three addresses for that member. Your shipments in that case might have been to just one of those addresses? Is that what you are saying?

A. They could have been, yes.

We never made any shipments to 270 Broadway, New York, but payments for purchases were received by us from that address, 270 Broadway, New York (Part 2, Page 55).

Q. Mr. Goetz, there is a note on here to the effect of "starting date, December 1, 1947" followed by a note "sole predecessor group Automotive Group Buyers, Inc., since 1940," but Automotive Group Buyers, Inc., does not appear in this list of group-buying organizations. Can you explain the absence of Automotive Group?

A. It does not appear for the reason that when this statement was prepared it was the groups to whom we sold at that time (Part 2, Pages 55 and 56). At the time of preparation Automotive Group Buyers was not active. When it was active, approximately the same members belonged to Automotive Group Buyers as belonged to Metropolitan Automotive Wholesalers, approximately, although there have been some additions and some losses. During

the existence of Automotive Group Buyers, its members sent us group purchase orders. With reference to Commission's Exhibit 30F, various members listed there also sent us purchase orders on a form headed with the name "Cotton States, Inc." (Part 2, Page 56), and in response to those purchase orders, we shipped from St. Louis to the places of business of the several members or the customers of the members (Part 2, Page 56). In all cases these group-buying organizations operated in similar fashion with respect to their purchases from Moog Industries, Inc., except as to Southern California Jobbers, Inc., and Southwest Automotive Distributors. The difference in these two latter operations was that the purchase orders were not placed on forms bearing the name of the group organization. In the case of those two buying organizations, the purchase order forms submitted to Moog were the regular purchase order forms employed by the several members in the conduct of their business and had their own heading on the form or no heading at all (Part 2, Page 57).

Thereupon, Commission's Exhibits 30A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, and X were offered and received in evidence (Part 2, Page 58).

Mr. Goetz then produced sales summaries kept in the regular order of business and relating to summarizing or evidencing sales made during the calendar years 1947, 1948, and 1949, for the following-named cities: New York City, New York; Brooklyn, New York; Newark, New Jersey; New Brunswick, New Jersey; Orange, New Jersey; Memphis, Tennessee; Nashville, Tennessee; New Orleans, Louisiana; Denver, Colorado; Des Moines, Iowa; Sioux City, Iowa; Fort Smith, Arkansas; Birmingham, Alabama; Mobile, Alabama; Jackson, Mississippi; and Salt Lake City, Utah.

Trial Examiner Kolb: Let the record show that Mr. Goetz, pursuant to the operation of the subpoena just referred to, has produced approximately 1100 cards. It is in the agreement between counsel that these cards be returned to Mr. Goetz for the purpose of numbering, and, when this is completed, Mr. Goetz is to send the cards to the Trial Examiner at Washington for the purpose of

turning them over to the attorneys for the Commission and accepting their receipt therefor. These cards are to be used by the attorneys for the Complainant, or other employes of the Commission, for the purpose of making such analysis as may be desired, and, upon completion, will be returned to Mr. Goetz, of Moog Industries, Inc., unless for any reason it is necessary to use these cards for some other purpose in connection with this proceeding, in which event, request may be made to the Trial Examiner for photostating as may be necessary. In the event any of the cards are photostated, it is agreed by the parties that they will all be treated as originals. Let the record show that each side has answered "Yes".

(Thursday, October 19, 1950.)

At this point counsel for Moog Industries, Inc., asked that it be understood that as to each and every question that is asked of witnesses that appeared to-day under the subpoena ad testificandum, there will be an objection to each question on the ground that the respondent is not deemed to have waived his constitutional rights questioning the jurisdiction, and each of said questions is objected to on the ground that it is beyond the scope, authority, power, and jurisdiction of the Commission (Part 2, Pages 73 and 74).

Trial Examiner Kolb: The objections as specified by counsel for Respondent will be deemed to have been made as to the witnesses testifying in the first instance and as to all questions asked the witness, and will also be deemed to have been denied or overruled by the Trial Examiner.

HUBERT P. MOOG, as a witness for the Commission, testified:

My name is Hubert P. Moog. I live at Congress Hotel, St. Louis, Missouri. I am President of Moog Industries, Inc., whose address is 6650 Easton Avenue, St. Louis, Missouri. I have been President since 1919. The business was founded by my brother and myself in 1919. At that time it was operated under the name of St. Louis Bolt &

Spring Company (Part 2, Page 76). A couple of years after the Company was founded, the name was changed to St. Louis Spring Company, and in 1943 the corporate name was changed to Moog Industries, Inc. Mr. A. A. Apple is Vice-President, Anton M. Goetz is Secretary, and Hubert C. Moog is Treasurer. The same officers are members of the Board of Directors, I believe. I actually don't know (Part 2, Page 77).

Moog Industries, Inc., controls certain subsidiary corporations. They are St. Louis Spring Company of Texas, St. Louis Spring and Service Company of Texas, St. Louis Spring and Service Company of Missouri, and one more in Colorado. I don't recall the name of that one. I believe St. Louis Spring Suspension Service of Nebraska is a part of Missouri, but I am not sure; I don't know; I have forgotten. I know where they are located, but I just can't recall how many subsidiary corporations Moog controls. I don't know what the corporation name is, but I know where the places are (Part 2, Page 78).

The Company first began to manufacture springs and spring products around 1922 or 1923 (Part 2, Page 79). At that time only leaf springs were manufactured (Part 2, Page 80). Our operation in 1922 was a combination of repair work, repairing springs and making a few springs, and buying a lot of odd stuff as a jobber, and we purchased a lot of our stuff in 1936. I think, when we moved into the new place on Easton Avenue. I would say it was a combination of purchases from other manufacturers and manufacturing some parts of it ourselves, up to 1936. I believe up to 1926 or 1927 we operated only in a local way with a few accounts outside of town, but in 1926 or 1927 we decided to go and sell to outsiders, to other jobbers, and bill through a jobber in St. Louis, where we still operated a spring department as part of the business. In 1927 we only were manufacturing leaf springs and leaf spring parts. In 1933 or 1934, when knee action coils, like Buick and Oldsmobile first brought out, we were scared the spring business would not last and bought a piston ring plant from Jamhorst in California under the name of St. Louis Motor Production, I believe is the name of it, and we operated that from 1934 on. In 1937, when more cars came out with

knee action, we decided to go into knee action, what we call coil action parts,—I don't know what the other fellows call it. I believe it was coil springs suspension and all of that sort of stuff. This was largely suggested by Mr. Apple, and he and my brother did all this. I traveled all the time. I traveled from 1927 or 1928 until 1941 (Part 2, Page 82). In 1937 it took us some time to get ready to make knee action parts and coil action parts, as we call them, and it was in 1938 we got into the Chicago show and the S.P.M.A.W.E., a combination show.

Mr. Apple, when he first came with us, was a manufacturer's agent. I think in 1936 or 1937, or a little later he was made Assistant Sales Manager. Up to about 1938, Moog was primarily in the spring line and piston ring line, and in 1938 we added the coil action line. About 1947, I believe, we added a chassis parts lines. At the present time we have a spring line, a coil action line and a piston ring line (Part 2, Page 83). The chassis parts line is not a part of the spring line. It is all in one contract but it is not a part of the spring line at all. It really is a fourth line, when we started it. We now have thrown the coil springs, which was not mentioned, and came in about the same time, and the chassis parts into one line.

As of 1947 we were making a coil action line, a line of springs and spring parts and piston rings line (Part 2, Page 84)., and a line of chassis parts. We were not making too many of these. We purchased a lot of them. I don't know the year that we started selling and distributing a line of coil parts, but it was after the war. That is our complete line as of today. Our manufacturing facilities are located at 6650 Easton Avenue, St. Louis. We have sub-contractors in other places. We own no other manufacturing facilities (Part 2, Page 85). The subcontractors are individual concerns and are not owned or controlled by us. With reference to coil action parts, as to what extent Moog Industries, Inc., produced them, I cannot quite answer that. We manufacture practically 100% of the leaf springs, but sometimes in an emergency, we get help from others. We have the manufacturing facilities for a complete line of these springs (Part 2, Page 86). The coil springs are made by somebody else and we purchase them for re-sale. All of the piston rings are made by us.

After we buy the castings, the finishing process is made by us 100%. The several items that make up the chassis line are spring bolts, tie rods, intermediates, tie rod ends, and shackles. As to the extent that Moog processes or manufactures the tie rod parts, I don't think I would like to answer that one (Part 2, Page 87). We buy the tie rods in that line 100%. The spring bolt set is a purchased line, although we make a small percentage. In respect to shackles, we make only a very small part. We purchase the others and pack it in our own boxes. Most of our chassis line is purchased for re-sale. The coil action parts provide the mechanical equipment which enables the front wheels to be independently suspended from the frame of an automobile, and the words "coil action" were coined by Moog (Part 2, Page 88).

Q. Now, when you speak of coil action parts, you don't include the spring in that, do you?

A. The spring is a part of the assembly that makes all of it. In other words, coil action is the hinges and parts that make it possible for that to work as a spring would work and a shock absorber is part of the assembly which we don't have.

Q. When you refer to Coil action, you refer to the mechanism without the spring part, don't you?

A. It is not a part of the coil action line. It is separate. That's what you are referring to?

Q. That is right.

A. We only have one type of customer and that is our distributor (Part 2, Page 89). It is a jobber which we type as a distributor. I don't know of any industrial accounts that we sell to. There may be, but I can't remember them. Mr. Apple or Mr. Goetz would know that. We do make some springs for some trailer manufacturers. That is a different type of customer. It is a very small percentage of our business to the industry itself. It is small in volume. Our business is replacements (Part 2, Page 90). In the replacement parts market, we refer to our customers as "jobbers" or "distributors" (Part 2, Page 91). In the price lists we call them distributors and when we are talking about them we call them a jobber or wholesaler. They can be referred to as a jobber or wholesaler or distributor.

It is one common definition. With any correctness I cannot estimate the number of these wholesalers, jobbers, or distributors. Mr. Apple or Mr. Goetz could answer that.

As to when our company first initiated the practice of granting a volume rebate, based on volume of purchases, to be honest with you I don't know how to answer that (Part 2, Pages 92 and 93). As of to-day we grant a rebate to our customers based on volume of their purchases. The practice of Moog Industries, Inc., to grant such rebates dates back to the time when we purchased a piston ring plant. We fell heir to that with the piston ring plant—somewhere around 1934, I can't remember dates too well (Part 2, Page 93). We purchased the piston ring business of St. Louis Motor Parts Company from the owner in California at that time (Part 2, Page 93) and changed the name to St. Louis Spring Company.

Q. An annual rebate then, based on volume of purchases, was first instituted by Moog in 1934, is that correct?

A. On what date I can't tell you. We purchased that and that was just part of the piston ring plan. What dates we did it, I could not—I can't remember. In 1934, Moog was not granting an annual volume rebate based on volume of spring purchases. In 1938 Moog was not granting an annual volume rebate based on volume of spring purchases (Part 2, Page 94). The various items that are included in our spring line are leaf springs, main leaf spring parts like bushings, center bolts, rebound clip bolts and coil springs. I can't recall the exact date we began to include coil springs in the spring line (Part 2, Page 95). The sales department could tell you better what is included in the spring line better than I can (Part 2, Page 96). I cannot tell you particularly. Mr. Apple in the Sales Department can (Part 2, Page 96).

Q. Can you answer the question, Mr. Moog?

A. Not completely and not intelligently because I—would rather not.

Q. Can you answer it?

A. It may not be a true picture as far as I know. I leave those details to Mr. Apple.

Q. Do you know the various items that comprise the spring line of the Moog Company?

A. As far as I know, I told you it was leaf springs, bushings, center bolts, rebound clip bolts.

Q. Does it include coil springs?

A. I don't know; I don't know.

Moog Industries, Inc., grants to its customers a rebate based on the annual volume of purchases of coil action parts. It is in the contract. I don't know the date, but I imagine from 1939 or 1938 it has been the policy of Moog to grant a rebate based on the volume of purchases of its customers for its coil action line (Part 2, Page 97).

Q. You testified, Mr. Moog, that you began giving a volume rebate on piston ring purchases back in 1934. Has that policy continued to date?

A. I said before that we fell heir to the volume rebate when we purchased the piston ring plant.

Q. And you have continued it?

A. Could not help it to stay in the ring business.

Q. Have you continued it.

A. Yes, sure (Part 2, Page 98).

At the present time we grant volume rebates on leaf springs (Part 2, Page 101). I don't know how long we have done this, but it runs from around 1949 on July the 1st, or maybe a little bit earlier; you have got the contracts on that; there is no secret to that part of it; I don't know the exact dates.

As to rebates on spring bolts, I am not trying to evade the question, but I believe Mr. Apple can answer that better than I can as to when we started volume rebates. I cannot tell you because I don't know (Part 2, Pages 101, 102).

Mr. Schrupp:

Q. I don't think the question is whether Mr. Apple can answer any better than you can. The question is can you answer it, and, if you can answer it, I wish you would answer it, and if you can't answer, flatly state you cannot answer it.

Witness:

A. I cannot answer it. I don't think so because I don't know (Part 2, Page 102).

I had no dealings with the group organizations that buy from Moog Industries, Inc. (Part 2, Pages 102, 103). I travel a lot. I had no dealings with any of the group organizations. In the course of my selling activity I made it a practice to call on various jobbers.

Q. And did you negotiate with them as to the terms of sale at which they could buy Moog products?

A. I can't remember, but I don't think I did.

Q. You did not discuss price with these customers that you called on, Mr. Moog?

A. No; I didn't necessarily.

Q. Can you explain that?

A. The regular customers that were buying from us I merely went in and worked up an order and took it and wrote it down and sent it in (Part 2, Page 103).

Q. Did you know the price at which those customers bought the products of Moog?

A. Never came up. I'm one salesman I don't think who ever quoted a price to anybody.

Q. For how long were you actively engaged in selling on the road?

A. 1923 or 1924 until 1941 in October. During that time the question of price never came up with the customers I deal with. I am not familiar with the policy of Moog respecting trade allowances. That is in the hands of Mr. Apple and Mr. Goetz.

Q. Were you familiar with the policy of Moog with respect to freight allowances at any time that you were selling on the road?

A. I don't understand the question.

(The question was then re-read.)

A. I don't know how to answer it, to be frank. I would say it did not come up when I was talking to them at any time.

Q. Do you know the current obsolescent policy of Moog?

A. We do the best we can.

(Part 2, Page 104.)

The question of obsolescence once in a while arose when dealing with customers on the road.

Q. Do you know what the obsolescent policy was from 1937 through 1940?

A. I don't think we had one actually.

Q. Have you had a definite policy since 1940?

A. The sales department might have, but I don't know what it is and I don't remember what it is. I can't remember. From time to time I traveled Illinois, Missouri, Kansas, Arkansas, Oklahoma, Colorado, Nebraska, Iowa, North and South Dakota, Minnesota, Wisconsin, and I traveled East through Indiana, Kentucky, West Virginia, Virginia, Pennsylvania and New York. During these travels I can truthfully say I did not contact any members of the group organizations.

Q. Was there any particular type of customers of Moog that you did contact?

A. When I started traveling, back in 1927 and 1928, I called on a lot of people but never discussed those things that you are asking about, or knew whether it was a group or not. It did not make any difference (Part 2, Page 105).

Q. Did you ever have any dealings with Osborn, Crow and Yantis Company?

A. I know Mr. Yantis but I never talked to him about anything like that.

Q. You never made any arrangements with Mr. Yantis as to prices and terms of sale of new products to Osborn, Crow & Yantis?

A. I said I talked to them but not about that particular question. I don't remember talking to them about the subject you are bringing up or the arrangements that you are talking about. I know Mr. Myles of Myles Meyers Company of Memphis, Tennessee. I never discussed price or terms of sale of Moog Products with him. I know Mr. Louis Post of Greenwood, Mississippi. I met him many times in Chicago but I never talked to him about those things. I probably met him at his place of business back

in 1927, 1928, and 1929 in Greenwood (Part 2, Page 106). These meetings in Chicago with him were at the S.P.M.A.W.E. Show. I never met Mr. Lurch of New York.

There was no cross-examination.

(Part 2, Page 107.)

November 8, 1950.

AD APPLE, called as a witness for the Commission, testified as follows:

My name is Ad Apple (Part 2, Page 113); I live at 59 West Sherwood Drive, Overland, Missouri, and my business address is 5660 Easton Avenue, St. Louis, Missouri. I am General Manager of the Respondent, Moog Industries, Inc, and have been such for about eight years. My duties as General Manager are to oversee the different operations and the sales work with the rest of the boys in their departments; the handling of the policy and of that type. As to general supervision, we have an unusual organization in this respect, that our boys pretty well handle their divisions and we work together, more or less, as an operating committee. That is the best way to describe it. Before I became General Manager I was in charge of sales (Part 2, Page 114). I held that position about six or seven years and was a salesman before that. I have been with the organization about twenty-eight years, although Mr. Goetz says it is about twenty-five, so let us put it at about 1925. The business was then known as the St. Louis Spring Company. As to whether that represents merely a change of name of the corporation, I am not as familiar with those particular changes as possibly I should be, but Mr. Goetz is (Part 2, Page 115). It, however, has been a continuing enterprise. I am an officer of the company and hold the title of Vice-President. I can't tell you how long I have held that position but it has been a good many years. I cannot recall whether I was an officer when I became Salesmanager. My memory does not go back as to when that happened (Part 2, Page 116). To the best of my recollection I became

an officer around 1935. It might have been a little sooner than that. I am of the opinion I am a Director, but I am not sure. Mr. Goetz can answer that.

At one time Mr. S. Alva Moog was connected with this Company (Part 2, Page 117). He is now deceased. He was General Manager from 1936 until his death, I believe in 1941. He also was Secretary and Treasurer.

We have a number of organizations like St. Louis Suspension Spring Service of Memphis or of St. Louis. I can think of St. Louis Spring Company of San Antonio, St. Louis Spring Company, Spring Specialist of San Antonio, and Spring Suspension of St. Louis, and Moog Industries of Colorado and of Tennessee. I believe that is the way they are listed (Part 2, Page 118). We have merchandise and automotive parts warehouses in different sections of the country. We pay a fee for those services. We have approximately, twenty or twenty-one of them. All of the actual production facilities are in St. Louis.

Q. Do any of these subsidiary corporations have fabricating facilities?

A. Only for emergencies for some of the business.

Q. But they do have fabricating or production facilities?

A. We wouldn't call them—we wouldn't call it manufacturing or production; we would call it a service operation (Part 2, Page 119).

The witness' attention was directed to Commission's Exhibit 1, and particularly at Page 3 to the word "line" as it appears in the second line and again in the seventh line, and in the plural on the tenth line and was asked whether or not that had any particular meaning to him. The witness answered that that is the standard practice set-up; that it was set up that way to clarify each one of the lines, that is, leaf springs, the spring lines made up of plain leafs, helper springs and so on, and then the other parts are all put down that way in order to clarify them.

Q. Does the word "line" have some significance in your trade, Mr. Apple?

A. Only to this effect that all of our distributors may carry—very few of them carry our complete line. They carry one line or other. One distributor may carry one

and another may carry another line, or maybe one will carry two lines; so that is why that is set up to clarify it.

Q. The word "line" would appear to include the allied items of a particular classification or category of manufacture, would it not?

A. Well, the springs are a good example.

Q. Could you tell us what the various lines are that you now sell to distributors? (Part 2, Page 120.)

A. That we now sell to distributors, not manufacturers, but sellers and distributors, we have our leaf spring line, our coil spring line, our piston ring line our king bolt line, our tie rods ends line, and our shackle line and the helper springs are also classified, which is an auxiliary part, an accessory part, as line. We also have a coil action line. Helper springs are classified under the springs, but in our thinking and selling we sometimes set them up separately because there are customers who buy helper springs. The various items that make up the spring line are leaf springs, plain springs, special springs and helper springs. Certain distributors buy only helper springs of us. At all times since 1936 we have had a leaf spring line as well as a helper spring line (Part 2, Page 121).

The items that make up the coil action line are those items that are used in the individually sprung front ends and consist of pins, bushings, and forgings. We first began selling and distributing the coil action line the latter part of 1938 or early 1939. The development of that line was, in our estimation, necessary because the items we were making were replaced. Our coil action line replaced leaf springs and that was our reason for going into that line (Part 2, Page 122), and at all times since late 1938 or early 1939, we have sold and distributed a coil action line. Since 1936 we have sold and distributed a line of piston rings. As to when we first began the sale and distribution of the line of coil springs, dates like that are hard to remember. I would say it started approximately in 1946. I may be a litfle off on that. We had partial coverage.

King bolts, tie rod ends and shackles are items in the chassis line. "Chassis parts" is a broad term. It consists of a lot of other items. As to when we first began selling and distributing tie rod ends, I would have to guess again,

and say it was around 1946 or 1947. That is the newest part of our operation. As to when we began the sale and distribution of king bolts, they all practically started together. There was not too much difference; they dovetailed (Part 2, Page 123). I refer by that to the king bolts, the tie rod ends and the spring shackles. We would classify those items as "chassis parts".

Q. Having reference now to the first page of Commission's Exhibit 1, and particular having reference to this item here, listed as "knee springs, helper springs, and spring parts," could that be considered a part of your leaf spring line?

A. That is a leaf spring.

Q That is leaf spring line; and in that connection you have used the term to include the helper springs?

A. Yes; as I mentioned to you before.

The witness was then asked to estimate the approximate percentage of sales in 1936 that would be attributable to the leaf spring line (Part 2, Page 124). The witness answered that he would have to guess and that could better be answered by Mr. Goetz; that he did not know how much. At that time we had two lines, piston rings and leaf springs. Sales in the leaf spring line predominated. Piston rings in 1936 did not amount to too big a volume. The witness was then asked would it be as much as 10%. The witness stated that he did not want to make an answer to that as he believed someone else could answer it better (Part 2, Page 125).

Q. Mr. Apple, is the market for motor parts divided between original equipment and replacement equipment? (Part 2, Page 126).

A. We say "equipment parts business" and we say "replacement business". Since 1936 a significant part of the company's production and sales have been in the replacement parts market.

Q. Does the company refer to many of the customers in that market as "distributors"?

A. The words "distributor" and "jobber" are synonymous in our industry in most cases.

The witness was asked if they referred to replacement parts customers as "distributors" or "jobbers", and the

witness again answered, "The words are synonymous in our case".

Q. Do these distributors or jobbers, who are customers of Moog, generally handle all of the Moog lines?

A. Definitely not. A customer may handle the leaf spring line but not the coil action line, or he may handle the piston rings but not the leaf springs (Part 2, Page 127).

The witness was asked to estimate approximately the number of customers they had for coil action parts at this time and answered that it would have to be an estimate; that he would estimate from 900 to 1,000 that they called distributors or jobbers. The witness was asked to make the same estimate of the spring line and answered "approximately 500 or 600"; that they had a total number of accounts of around 1400; that the total number of accounts included the spring line, the piston ring line, the coil action line, and the chassis parts line, and all the parts that he had mentioned; that the same figures would hold true during the period 1947 to 1949, approximately.

Q. Does Moog have a sales arrangement with Mid South distributors?

A. We have one contract for everyone. We have a contract with Mid South (Part 2, Page 128).

Q. Now when you say "one contract for everyone" are you making reference to a document similar to that known in the record as "Commission's Exhibit 1," and also to the version known as "Commission's Exhibit 6"; another version being "Commission's Exhibit 7", another version "Commission's Exhibit 8", and another one is "Commission's Exhibit 14."

A. This represents nothing more than our rules of standard practice, and this is what they mean.

Q. You are referring now to those various form contracts that I have—

A. The blue contracts?

Q. Is the single contract that you have made reference to similar to this contract which is now in the record as "Commission's Exhibit 1"?

The witness answered (indicating) "This is the agreement right here that is in effect I believe at this time."

Q. Is that the single contract to which you have reference?

A. As to what we used with all of our distributors? Yes; or, as I mentioned before, these are rules of standard practice rather than contracts.

Q. Now having reference to Commission's Exhibit 1, that is, to Exhibits 6, 7, 8, and 14, they represent earlier versions of that same type of contract, do they not?

A. Yes. They represent earlier versions (Part 2, Page 130).

The witness was asked when his company undertook a sales arrangement with Mid South Distributors. He answered he did not know the exact date, as until S. A. Moog died he handled Mid South. He was then asked "Could that be the year 1934," and the witness answered "On dates going back sixteen years" that he could not safely tell; that Mr. S. A. Moog handled the situation then. I didn't take part in the original negotiations with Mr. Mills. Mr. S. A. Moog handled it and I followed through when Mr. Moog passed on. The witness was pressed for an answer as to approximately when that arrangement was made, and again made the statement that he didn't recall; that he knew it was somewhere in the 1930's but he did not know as to what year (Part 2, Page 131).

The witness was then asked if he could ascertain the date that his company first began selling to Mid South Distributors and answered that he could get that through the bookkeeping department (Part 2, Page 132).

The witness was then asked if he knew the terms that were accorded to Mid South Distributors in the period between 1936 and 1940, and answered he did not have the data for that period. The witness was then handed a letter and asked if that refreshed his recollection and he stated he had never seen the letter, and when asked if it refreshed his recollection, he said that it did not (Part 2, Page 133). The witness stated he knew part of the terms; that he knew about the sales part of it as to various points that came up in selling procedure; and that that was about all. Asked what these various points in selling procedure were, if he could recall, the witness stated it was the taking care of the cataloguing, the contacting from the angle of sales and in

line with the way the industry operates arranging for field work from time to time.

Q. Did you know anything about a periodic payment from Moog to Mid South running to 5% of the net billing?

A. I was in the position in those years to say that I knew nothing about the deal.

Q. Did you deliberately put yourself in that position?

(Objection was made to this question and sustained.) (Part 2, Page 134.)

Asked what he knew about field work with reference to Mid South Distributors, the witness stated that it was standard practice in the entire automotive parts industry to give field work, and from time to time arrangements were made for that kind of help, but the application of that to Mid South Distributors was exactly the same as to every other distributor.

Asked about what he knew about cash discounts with reference to Mid South Distributors, the witness answered that it was the same as all distributors; that in those days it was different from what is to-day; that it was 1%.

Thereupon Commission's Exhibits 32A to 32S, inclusive, were marked.

The witness was shown a document and asked if he recognized the signature on it. It bore the date of October 30, 1939 (Part 2, Page 135). The witness stated that it was very faint but that his judgment told him it was "S. A. Moog." The witness was then handed Commission's Exhibit 32B and asked if he recognized that signature and stated that he came closer to recognizing it than the other one; that if you compared them you could see what he meant; that on this one he could say that he did not recognize the signature and on the other one "Yes". Pressed as to whether he recognized the signature, the witness answered that the name was not complete on one and on the other it was (Part 2, Page 136). The witness referred to the name on Commission's Exhibit 32B as not complete and the name on Commission's Exhibit 32A as being complete. Commission's Exhibit 32A through "S" were then offered in evidence. (Part 2, Page 137). Commission's Exhibit 32A to 32S, inclusive, excepting 32B were then received in evidence (Part 2, Page 141).

I am familiar with the arrangement on most matters currently existing between Moog and Mid South Distributors. A lot of it we leave up to our bookeeping and auditing departments. I first familiarized myself with the arrangement after the death of Mr. Moog I was not familiar with the arrangement during Mr. Moog's lifetime (Part 2, Page 141).

Moog Industries, Inc., has a sales arrangement with Ozburn, Crow & Yantis Company. I do not recollect the date when Moog first made a sales arrangement with them. My guess would be some time in the early 30's, probably 1935.

The witness was asked if he recalled that Mid South protested that the prices accorded to them were not equivalent to the prices accorded Ozburn, Crow & Yantis Company, and answered he did not. Commission's Exhibits 33A and "B" were then marked and handed to Mr. Apple and he was asked if it refreshed his recollection and answered that it did not.

Q. Did you or Moog have a conference with Mr. Mills relative to the fact that Ozburn, Crow & Yantis got a better price than Mid South Distributors, approximately in 1940?

A. No; I told you I didn't have anything to do with that until Mr. Moog's death, regarding terms and such as that. (Part 2, Page 143).

Commissioner's Exhibit 34A and B were then marked for identification, and the witness' attention was called to the last paragraph of the form letter and asked whether it refreshed his recollection. The witness read the letter and stated it did not refresh his recollection, and that he definitely did not recall any conference with Mr. Mills (Part 2, Page 144); that undoubtedly there was one according to the letter, but he did not recall it; that he had talked to Mr. Mills one hundred times; that he did not have anything to do with that account so far as the group was concerned until Mr. Moog died. The witness then gave the reason why but the answer was stricken by direction of the Examiner.

Moog currently had the sales arrangement with Cotton State, Inc. (Part 2, Page 145). "I do not remember whether

we have sold them as long as we have sold Mid South Distributors, or Ozburn, Crow & Yantis;" that he could not give a definite answer; that it was approximately about the same time.

Q. In the period between 1936 and 1940 did Moog offer generally to the trade anything in the way of rebates or merchandise bonuses or discounts, based on annual volume of sales?

A. Piston rings; yes. I am not sure when Coil Action started. Leaf Springs; no. That gives you the answer.

Q. During the period 1936 to 1940 there were no merchandise volume discounts or anything, based on volume of purchases with reference to the same lines; is that correct?

A. Volume—it started on spring action at least. Volume rebates first started with reference to sales of the leaf spring line sometime during 1949 and on the coil action line he would make a guess about 1940-1941 (Part 2, Page 146).

Moog has had a regular contract with Metropolitan Automotive Wholesalers Co-Operative, Inc., of New York City for years. I don't remember when they were started. I would have to guess. My guess would run from 1941 or 1942. That group at that time was known as Automotive Group Buyers, Inc., I think that it was first negotiated with Mr. Satchell. Mr. Lerch came in after Satchell. Mr Lerch did not ask for exclusive distribution of our products in the New York area (Part 2, Page 147), and definitely I did not promise to give it to him. We do not have exclusives anywhere.

The witness was asked if he recalled the principal terms of his arrangement with the New York crowd at the time of its inception, and answered "Not entirely". The witness was then asked if they had asked for exclusive distribution, with the exception of one or two accounts in the New York area and answered "No"; that the question of exclusive distribution was never brought up.

The witness was then asked if he recalled the rebate or merchandise bonus schedule that was used by Moog during the years 1940 through 1945 and answered that he did not remember without refreshing (Part 2, Page 148).

Commission's Exhibits 35A and "B" were then marked for identification.

The witness was then handed this exhibit and asked if it refreshed his recollection as to which discount schedule was effective in 1940-1945. The witness referring to the schedule on Commission's Exhibit 35B stated that it was somewhere in that period but he did not know how long it lasted (Part 2, Page 149). The witness stated that on Commission's Exhibit 35B that that was a photostatic copy of his signature, thereupon Commission's Exhibits 35A and "B" were offered and received in evidence (Part 2, Page 151).

The witness was then asked, having reference to the schedules set out in Commission's Exhibit 35B, did he know when that was an effective schedule with reference to coil action parts. Witness stated that he would just have to guess because he did not know how much interval there was between changes; that it was signed in 1943 and that is his guess (Part 2, Pages 152, 153). The witness stated he could not state definitely when that became an effective schedule because there were four or five of them, as the Attorney for the Commission knew.

Q. Mr. Apple, do you know when the schedule on the coil line that appears on this third page of Commission's Exhibit 1, was first made the effective schedule with respect to the merchandise bonus on those lines?

A. I can't give it to you definitely. This looks like it is our last from here (indicating).

Q. Do you know when the schedule appearing on Page 3, with reference to the coil action line, was made the effective schedule?

A. No; I do not.

Commission's Exhibits 36A and B, 37, 38, 39A and B, 40, 41A and B, and 42 were then marked for identification (Part 2, Page 153).

Tuesday, November 9, 1950, at Washington, D. C.

Mr. Apple resumed the stand.

The witness was shown Commission's Exhibits 36A and "B", purporting to be a letter of St. Louis Spring Com-

pany, of August 8, 1945, and was asked whether he recognized the signature on Commission's Exhibit 36B. The witness answered that it was a photostat of his signature (Part 2, Page 156). The witness was shown Commission's Exhibits 39A and 39B, purporting to be a photostatic copy of a letter of St. Louis Spring Company, of August 13, 1945, and was asked whether he recognized the signature on Commission's Exhibit 39A and stated it was a photostat of his signature.

The witness was then shown Commission's Exhibits 36A and "B", being a letter dated August 3, 1945, and was also shown Commission's Exhibit 37 and was asked whether or not his letter of August 3, 1945, was in reply to that letter (Part 2, Page 157) and the witness answered that it was.

Q. Now having reference to Commission's Exhibit 36A and "B" for identification, I would like to show you Exhibit 38 for identification, purporting to be a photostatic copy of a letter dated August 10, 1945, and ask you whether or not it is a copy in reply to your letter.

Witness: This letter, I, of course, would not remember. It is not signed, it is "President" and evidently it is from Mr. Mills, but there is no signature on it (Part 2, Page 158).

Q. Do you recognize the contents as responsive to the other letter, Commission's Exhibit 36A and "B", Mr Apple?

A. I don't remember this letter here (indicating); I don't remember it at all. It is five or six years ago. This (indicating) definitely is my letter here. (The witness was indicating Commission's Exhibit 36A and "B" as his letter). (Part 2, Page 159).

Commission's Exhibits 36A and "B", 37, 38, 39A and "B", and 40 were then offered and received in evidence (Part 2, Page 160).

Our regular contract was the arrangement in effect with Mid South Distributors from 1945 to the present time.

Q. When you say "regular contract" are you making reference to these contracts, to contracts similar to those now in the record as Commission's Exhibit 1, 6, 7, 8, and 14?

A. I can give you a definite answer of "Yes" on this last one here (indicating). I, of course, would have to check on the others. (The document indicated was Exhibit Number 1) and stated that it was a contract or statement of rules of practice for everybody (Part 2, Page 161). That contract represents a statement of policy with all our replacement accounts. That form of policy states our policy with respect to sales of Ozburn, Crow & Yantis (Part 2, Pages 162, 163).

Q. These form contracts, Mr. Apple, that we have made reference to, all being similar to though not identical to Exhibit 1, have been used for approximately how many years with your distributor accounts?

A. Oh, I would say approximately six or seven or eight years.

Q. Do all distributor accounts have contracts similar to the particular one that was effective at any given time?

A. The contract in itself has been practically the same —in possibly one or two cases it was written on letterheads.

As I recall it the only case that comes to my mind, written on letterhead, is Ozburn, Crow & Yantis. At this time I do not recall any other distributor on which it was written on a letterhead (Page 163).

The witness was asked whether he was sure that there were other distributors who also had the statement of policy or the contract on letterhead paper and answered that he was not sure; that he had mentioned there were possibly one or two, and as he remembered Ozburn, Crow & Yantis was on a letterhead.

Q. Now you have referred to this as a statement of policy.

A. Statement of rules; yes.

Q. And were the rules, or statement of policy, enforced?

A. Not entirely. I don't believe any contract, ever, or statement of rules * * * (Part 2, Page 164).

The witness then stated that "Not entirely" was his answer (Part 2, Page 164).

The witness then stated that with the exception of some of the letterhead statements of policy, the distributor of accounts regularly signed them, as exemplified by Commission's Exhibit 1.

Q. The enforcement of the provisions, then, of Exhibit 1, was a matter of discretion with Moog, or was it a matter of negotiations between Moog and the account?

A. The statement of rules in this Exhibit 1, I believe it is here (indicating) represents the way that policies, the written policy, or written standard practice—this represents them. Now, there are extenuating circumstances, such as obsolescence, etc., and other situations, that change the particular picture. I would say that maybe 90% of our accounts understand and know our standard rules here and work along those lines. You always will have somebody that tries to take advantage of you; or sometimes Moog possibly may make some error—who can tell? That would be my explanation of that (Part 2, Pages 165, 166).

Q. Then it is more or less a matter of Moog's discretion as to whether the terms of the document will be adhered to?

A. Only in the case of Moog errors.

Q. Does it represent the terms accorded on sales between Moog and its distributors, with the exceptions you have noted?

A. If you mean by that that we have one contract for everybody—"Yes". As far as I can remember, "Yes".

I am familiar with the actual start of arrangements made with the Metropolitan Group of New York in the early 1940's with Mr. Satchell. As to what the arrangements contemplated, that is a long time back, I would have to be refreshed on that.

With reference to arrangements with Automotive Group Buyers with respect to a bonus in 1945, my recollection is that the original deal with Mr. Satchell was carried on. I don't remember just when. That was during the time, I believe of the 10% rebate. The 10% rebate carried beyond the time that we established a new volume rebate on the coil action line for a certain time.

The witness was asked to refer to the documents which were understood to be typical of the agreements used with distributors. In a colloquy between Commission counsel and defendant's counsel it appeared that Commission counsel had reference to Exhibit. 1 which according to the testimony of Mr. Goetz was effective for part of the time, and to Exhibit 6 which was the prior effective agreement and to Exhibit 7, 8 and 14 which were also standard contracts used at various times (Page 167).

Making reference then only to Exhibit 1 the witness stated that contained all the terms of sale unless some new or special items were brought out, or lines, for example like tie rod ends, and so forth.

We first began to provide a merchandise bonus plan with respect to the leaf spring line sometime in 1949 and after referring to Commission Exhibit 5 the witness stated that it was July 1, 1949 (Pages 168, 169). Prior to that time we had offered to distributors a merchandise bonus on leaf spring purchases. The fact of the matter is in N.R.A. days there was a merchandise bonus (Part 2, Page 169). After the N.R.A. period there was no published merchandise bonus so far as I know on our leaf springs (Part 2, Page 170).

Q. During the period of time between the end of the N.R.A. days and July 1, 1949, your company did, however, give a merchandise bonus or allowance to certain accounts, based on volume of springs purchased, did it not? (Part 2, Page 171.)

A. Yes for functional purposes for services rendered (Part 2, Page 172). The Trial Examiner on objection struck out the portion of the answer referring to "functional purposes and services rendered" (Part 2, Page 173).

The names of accounts other than distributor accounts that Moog is now selling must be equipment accounts. Some that run through his mind are Keystone Trailer. There are so little of that. Then they are working on some Government orders. He don't know whether they are working for the Government on springs or what line, but stated there are so few such accounts that he could say that represents them (Part 2, Page 174).

In addition, there is Dutten Lainson Company, a trailer company. They make trailer springs and equipment, a specialized service. That is all that I can think of at this time. I could not classify our accounts otherwise than equipment accounts and distributor accounts. We classify group accounts as distributor accounts on one contract.

We have no chain organization customers to-day. The last time we sold to a chain organization was approximately the start of the Second World War (Part 2, Page 175). Prior to that we sold for a number of years to Western Auto stores. As I recall, we sold them leaf spring items.

Q. Were they sold to that outfit on a price per pound basis?

A. Mr. Corkey, I don't know the answer to that. S. A. Moog handled it.

Q. Do you generally protect your distributor accounts from price declines?

A. I don't recall that it has ever come up. The policy of Moog with respect to price declines is (reading from document) "Our orders will be billed at the prices effective at time of shipment" (Part 2, Pages 176 and 177).

With reference to policy with regard to price declines for distributor accounts, you will have to let me qualify it because of the export situation. You have certain things come up where it takes three to six months to get shipments. Circumstances like that come up (Part 2, Page 177). With reference to the domestic market, other than this, indicating Page 1 of Commission's Exhibit 1, there might be circumstances respecting the protection of distributor accounts on price declines. Distributors' orders are billed at Moog's net prices at the time of shipment, but there are circumstances, of course, as I mentioned (Part 2, Page 178). Prices in effect at time of shipment are those that are used in practically all circumstances.

Q. Mr. Apple, having billed them in accordance with the effective schedule prices, do you have a policy that when the general price goes down, do you have a policy of re-billing?

A. It would only be in some special case. I would say, no policy; or I would say a policy where the prices in ef-

fect at the time of shipment—unless there be some special circumstances.

Q. That is a firm and fixed price?

A. That is a firm and fixed price unless there are special circumstances.

Q. And there is no policy with respect to pricing down to protect distributor accounts in the event the general price structure went down?

A. Only in cases of special circumstances which would come up, Mr. Corkey, and I can't recall them.

The witness was asked to look at Commission's Exhibit 13, the A. R. J. contract (Part 2, Page 179). We printed that contract for our customers. A. R. J. means Associated Ring Jobbers. Moog prints Exhibit No. 12 for our distributors. Moog prints Exhibit No. 11 for our distributors as well as Commission's Exhiibit No. 10.

The initials "C. P." on Commission's Exhibit No. 10 signify chassis parts.

We keep one copy of these contracts when executed for our records (Part 2, Page 180). None of the people who sign these contracts obtain from Moog anything in the way of a merchandise bonus, nor any sort of credit or allowance, based on volume of purchases.

On our distributors' order occasionally shipments are made from Moog warehouses or factories to their accounts. If a distributor orders shipment made directly to a particular outlet, Moog will ship to that outlet, limited to one order a month.

Q. Is that true on all three of those contracts that I showed you, or would it vary between the C. P. wholesalers' agreement and the A. R. J. agreement, and the Moog Parts Jobber agreement?

A. We had one stock order a month on those, as I recall it. I am not too sure on that, but as I recall it, we had, we would ship one order a month, on our customer disitributors.

The A. R. J. jobber is piston rings.

Q. Now, will you make reference to Commission's Exhibit 15 and typical price lists which appear therein? Would Moog furnish to the A. R. Jobber the yellow price

sheets, the pink price sheets, the buff price sheets, and the white price sheets? (Part 2, Page 181.)

A. Moog would furnish only our distributor; our distributor in turn might or might not supply to them. It is my guess that he would.

It is my idea that our distributors request sufficient price sheets to furnish them to their A. R. J. Jobber accounts and their C. P. Wholesaler accounts (Part 2, Page 182). We supply distributors with these on their request. What they do with them I don't know.

Q. Does Moog publish those price sheets, Mr. Apple, or does it cause to be published those price sheets, typical ones of which appear on this Exhibit 15?

A. You mean the suggested price sheets?

Q. All the price sheets that appear in their order, suggeted or firm, or any other kind.

A. Our re-sale prices are suggested prices furnished by Moog to their distributors.

Q. Moog causes those to be published, does it not? (Part 2, Page 183.)

A. At the request of our distributors, "Yes".

Q. Does the distributor determine the prices that would appear on those sheets, or does Moog determine the prices?

A. That is more or less set by the car manufacturer; the re-sales are determined by that. That is how they are worked out.

On certain lines the purchaser assists in making up these prices. They have to have in their estimation certain re-sales. At this time it is more or less following in line with car manufacturers' sheets.

Q. Does the Distributing Company and Moog negotiate those prices to be set up?

A. They request them.

Q. Is it a negotiation, then, between Moog and certain distributors as to the prices that appear on those price sheets? (Part 2, Page 184.)

A. The answer to that question would be "No" to certain distributors. I cannot name any distributors who take part in making up the price sheets of Moog at this time.

Q. Do representatives of Moog call on any of the A. R. J. jobbers or the C. P. wholesalers or the so-called Moog jobbers?

A. Definitely yes, from the angle of follow through.

Q. As a regular part of their duties they contact those accounts?

A. Contact all accounts of all our distributors regardless of accounts, yes, as much as they can.

It is customary when our man calls for him to go in and inspect the stock of Moog parts held by that particular account and he draws up an order for submission to the Moog plant (Part 2, Page 185).

Q. The Moog representative always, whether or not the stock is incomplete, makes up an order for submission to the Moog plant?

A. Ordinarily they handle it.

Calling on accounts is our normal procedure, whether it is the smallest garage or the biggest account.

The witness was asked who determines the obsolescence policy on the C. P. wholesalers, the A. R. J. Jobbers and Moog Parts distributors and answered that there was no obsolescence policy for the C. P. wholesalers; that when they buy it they buy it. Protection on obsolescence, as I recall it, goes only as far as our distributor (Part 2, Page 186).

Asked whether the warehouses of Moog, located through out the country, were public warehouses, the witness answered he would not classify them as public warehouses. They are warehouses devoted to the warehousing of various lines. We pay the transportation charges from St. Louis to these various warehouses. The prices to our distributors of our stock are the same at the warehouses as they are at the factory at this time. It was different in the old days (Part 2, Page 187). That is essentially a warehouse storage situation dealing out our merchandise. We do not sell these products to these warehouses situated in the United States. We do in one case outside the United States. The zone system of pricing on some of our products was discontinued. I do not know on what date.

The witness was asked as to whether he could state why Ozburn, Crow & Yantis would not, during the period 1947 through 1949, sign a regular distributors' franchise, and answered that he guessed it was because that all through the years the rules of practice were set up and it was not because that company was accorded better terms (Part 2, Pages 188, 189).

The witness was directed to the Ozburn, Crow & Yantis agreement, signed in 1949, and asked to pay particular attention to the part about supplying a factory-trained salesman always to be with them, and requested the witness to find an equivalent in the regular distributors' agreement. The witness answered that it referred to "missionary men" entirely; that it referred to a factory-trained salesman to travel under the jurisdiction of the salesman; that Moog provides that for every one of their distributor franchise accounts (Part, 2, Page 189). We have now about forty factory-trained specialists.

Q. Is there a similar provision in your regular distributor contract in effect at the time this contract was entered into?

A. No; because it is regarded as standard practice.

Q. Can you give to every one of your distributor accounts a factory-trained specialist to work with it at all times?

A. Oh, no.

Q. Does this not provide for that in Exhibit 23Y?

A. Definitely not.

Q. It says that the manufacturer will supply a factory-trained specialist to travel under the jurisdiction of the salesman and work and help promote—

A. My answer to that is that this man did not spend all of his time there. Never has. Our records will prove it.

Q. I also want to call your attention to what would be the second paragraph of Commission's Exhibit 23Y and I will ask you whether or not that provision appears in the standard form of contract used by your distributor accounts during the same period of time? (Part 2, Page 191.)

A. Not exactly the same.

Q. Having reference to Commission's Exhibits 23Y and the last paragraph on that exhibit, does a similar provision, an identical provision, appear in any other distributor account?

A. Not similar but everything is not stated in those.

Q. Now also having reference to the paragraph which is the third paragraph of Exhibit 23Z-2, does an identical provision appear in your contract with any other distributor between 1945 and 1949?

A. I don't recall but I would say "not identical" (Part 2, Page 191). It did not appear identical to this in any of our formal contracts. I do not remember whether it might have appeared in any of the so-called letterhead contracts with distributors.

Q. Mr. Apple, making reference now as to what is the second paragraph of what is Commission's Exhibit 23Y, the second paragraph below the figures there, dealing with obsolescence, did an identical term appear in any of your other distributors contract during that period of time until 1949?

A. As far as I know, none just like that.

Q. Having reference now to Commission's Exhibit 23Z-1 and to the last paragraph of that exhibit, and the first paragraph of Commission's Exhibit 23Z-2, I ask you whether or not from the date of that agreement until it was superseded, was there any other distributors contract with you containing identical terms?

A. You make it very hard for me to answer the question.

Q. Were there identical terms in the contract with other distributors?

A. I would say none exactly identical (Part 2, Page 192).

Cross-examination of Mr. Apple was waived (Part 2, Page 193).

ANTHONY M. GOETZ resumed the stand and testified on behalf of the Commission:

The Moog line, for purposes of our accounting records, do not necessarily follow the Moog sales line. The accounting set-up of Moog lines at the present time is as follows: Originally we had one set of books and we only had the spring line, and all of the single corporations were carried under one set of books. In 1934, when we acquired piston ring business we set up another set of books. Then in 1939, when we started on a fairly large scale on coil action, we set up another set of books. Then after we acquired the chassis parts, and then the coil springs, because of the fact that they, in the main, were purchased parts, and we did not keep separate costs on those items, we threw them in our spring division books. So, for accounting purposes, the St. Louis operations are three sets of books as of to-day. As of to-day, springs, coil action, and piston rings, chassis parts and coil springs are thrown into the spring line.

The names of subsidiaries of Moog Industries, Inc., are as follows: There were the original ones in Colorado, Tennessee, and Texas. They were known as St. Louis Spring Company of Colorado, St. Louis Spring Company of Tennessee, St. Louis Spring Company of Texas. The names were changed in 1943 and St. Louis Spring Company of Texas was changed to St. Louis Spring Suspension Service Company of Texas. The Tennessee Company was changed to St. Louis Spring Suspension Service Company of Tennessee (Part 2, Pages 195, 196).

In 1944, the Colorado Company's name was changed to Moog Industries, Inc., of Colorado. In 1945 we changed the St. Louis Spring Suspension Service Company of Tennessee to Moog Industries, Inc., of Tennessee. In 1943, when we changed the name of St. Louis Spring Company of St. Louis, Inc., to Moog Industries, Inc., we formed another corporation with such a name—St. Louis Spring Company. For a short time it was an inactive company and then the service station operation at St. Louis and at Omaha were transferred to that corporation. The Omaha operation in 1943 was changed to St. Louis Spring Suspension Service Company. In 1948 we divested the Omaha

operation from the St. Louis Spring Suspension Company of Missouri, and formed the St. Louis Spring Suspension Company of Nebraska. The change in name from St. Louis Spring Company to Moog Industries, Inc., did not affect in any way the corporate set-up (Part 2, Page 197). At the present time, the accounting records of Moog Industries, Inc., are not integrated with the records of the subsidiary corporations (Part 2, Page 197). Each of the subsidiary corporations maintains its own accounting records, separate and apart from Moog Industries, Inc. None of these subsidiary corporations are engaged in production, however, other than emergency fabrication of parts, but they actively engage in the selling and distribution of our products.

Q. Does the customer list of Moog Industries, Inc., contain the names of the customers or purchasers from these subsidiary corporations?

A. There is a duplication in some cases but not in others.

The subsidiaries may have customers or purchasers who do not appear on the records of Moog Industries, Inc.

Moog first instituted a merchandise bonus or a periodic allowance, based on volume of purchases of coil action parts, almost immediately after they started the sale of those parts (Part 2, Page 198). Generally speaking, we tried to develop the line I think about 1937 but very little was done in that year. In 1938 we had our sources of supply pretty well lined up, and the sales of coil action really became important beginning with 1939, and about that time we got out a franchise agreement on coil action parts. I cannot give you the exact date when we began generally to give volume discounts in connection with customers' purchases of coil action parts, but it was in late 1939 or early 1940.

The witness was then shown Commission's Exhibit 35B, referring to merchandise bonus on the coil action line, and stated that from all indications it seemed to him that was the first one put into effect (Part 2, Page 199). That remained in effect until March of 1945 when we got out a new franchise agreement (Commission's Exhibit 14).

Q. Mr. Goetz, at that time the bonus or functional rebate on the coil action line was changed. It increased as it appears on Page 3 of the third page of Exhibit 14?

A. The printed portion of it, but not the typewritten portion of it.

The change, including the typewritten portion on the third page of Commission's Exhibit 14, was in 1945 about the first part of the year, but it was made retroactive for the full year of 1945 to most of our distributor account (the witness and counsel have been referring to the third page of Commission's Exhibit 14, and particularly to that part of the third page which has been typewritten).

Q. Mr. Goetz, again making reference to the third page of Exhibit 14, will you explain the various changes in the volume rebate of the coil action line having reference to the schedules set forth on the third page of Exhibit 14?

A. This schedule was made out, printed for the year 1945, but in the middle part of the year we decided to change the rates to the typewritten portion as appears in the schedules, making a maximum of 19% instead of 14% (Part 2, Page 201).

This first change as originally printed, which appears to be a high bracket of 14%, represented a change from the previous high of 10%. The schedule of the volume rebate on coil action parts has remained constant from that time until the present.

Q. Mr. Goetz, at some period between 1945 and 1949 a schedule was promulgated to the distributor trade in which the coil action line was included with the chassis parts and the coil springs. Was that schedule ever actually made operative?

A. It was in effect, but it had no value because that was an alternative schedule, and since we did not have accounts for chassis parts and coil springs, it did not have any effect. There was no occasion for any accounts to use it. (We have been making particular reference to the third page of Exhibit 7) (Part 2, Page 202).

During the period of 1945 through 1949, Moog did not offer a volume rebate in connection with the sale and distribution of chassis parts unconnected with the coil action line.

Q. I call your attention, Mr. Goetz, to the third page of Commission's Exhibit 6, wherein there is a schedule, chassis parts including coil springs, and I ask you whether or not you want to change your answer on that?

Witness: This is a combination here.

Mr. Corkey: It is a combination but unconnected with your coil action line.

Witness: All right, let us say "Yes, unconnected with the coil action line but connected with the coil spring sale" (Part 2, Page 203).

For purposes of volume rebate, chassis parts and coil springs were first grouped together with coil action, and then it was grouped with coil springs, and finally it was grouped with leaf springs. When chassis parts were grouped with the coil action line, there was nothing in connection for Moog to make any remittances under that schedule. Thereafter the chassis parts were grouped with the coil springs for purposes of volume rebate, about November, 1948. I don't believe Moog had occasion to use the schedule appearing on the third page of Commission's Exhibit 6 because the sales of those particular items to any one customer in that period did not come under the minimum requirement (Part 2, Page 204).

The chassis parts were first included with the leaf spring line for purposes of volume rebate in July, 1949, effective as of July 1. From 1940 until July of 1949, Moog did not offer to its distributor accounts a volume rebate, based on a volume of purchases of leaf springs, nor did they offer anything in the nature of a volume rebate during that period on purchases of the leaf spring line in conjunction with any other line. July 1, 1949, is the first day that Moog regularly offered to its distributor accounts a volume rebate or merchandise bonus in any fashion on the leaf spring line.

The Company first undertook a sales arrangement with Automotive Group Buyers, I believe, in 1940 (Part 2, Page 205).

Q. Do you know, generally, the terms of that arrangement as applied to the members of automotive group buyers, what they would pay for the product of Moog?

A. The price was the same as the price to all the distributors. The price did not include a rebate or allowance but was the same as all other prices.

Q. Was Automotive Group Buyers provided with any discount or allowance which would be applied to the net billing?

A. The answer will have to be "No" (Part 2, Page 206).

Q. Was Automotive Group Buyers accorded anything in the nature of a 10% discount to be applied to any of the billings made to the purchases of these members?

A. In making their remittances in the succeeding months, they deducted the maximum volume rebate, that is, to which we felt they would be entitled to—

Objection was made by Commission's counsel, and motion made to strike out as immaterial and the Trial Examiner sustained the motion (Part 2, Page 206).

In remitting to Moog it was the practice of Automotive Group Buyers to deduct 10% from the total billing of the members, less credit. I don't know how the cash discount was handled in this case. The witness was then shown a document to refresh his recollection and then stated "They deducted the cash discount after deducting the 10%". They deducted the 10% each month until we asked them to discontinue it sometime later in 1948 or 1949.

In the period between 1940 and 1945, the ordinary distributor account did not obtain a 10% off total billing less credit, each month. This was one of the exceptions and generally the 2% cash discount was not handled as in the case of Automotive Group Buyers (Part 2, Page 207). In the period from 1940 through 1945, this discount applied only to Coil Action parts.

Q. Having reference now to this period of 1940 to 1945, and having reference to Automotive Group Buyers and the 10% accorded them, did that include springs and spring parts or did that include all purchases, or just coil action line?

A. The only line which Automotive Group Buyers bought from us was coil action.

This method of billing Automotive Group Buyers continued until it was changed at the beginning of 1948. I am

a little confused as to the date, but I am reasonable sure that from 1940 until January of 1948, they continued to receive this 10% off on their billing.

Commission's Exhibit 43 was then marked and shown to the witness who stated that it represented a typical remittance statement from Automotive Group Buyers to Moog (Part 2, Page 208).

Commission's Exhibit 43 was then offered and received in evidence.

Q. Mr. Goetz, do you know what happened to the working papers or the other documents relating to the prices charged for purchases of Automotive Group Buyers during the year 1947?

A. The prices charged—They were the prices in effect at the time of the shipment.

Q. I am making reference, Mr. Goetz, to the fact that in response to the subpoena, heretofore issued, we have not had any information with respect to the prices charged Automotive Group Buyers during the year 1947 (Part 2, Page 209).

A. It is possible that the sales records for that period were not furnished but all other documents in existence in our files were furnished as requested by the Commission.

Beginning in 1948, the arrangement with Automotive Group Buyers was identical with that made with ordinary distributor accounts and since that time Moog has continued an arrangement with its successor, Metropolitan Automotive Wholesalers similar to that with every other distributor account.

I am familiar with the terms accorded Cotton States during the period 1940 to December, 1945. They were billed the same price as our other distributors (Part 2, Page 210).

Q. And in making payments on those billings, do you know the elements that entered into the payment as contrasted with the billing itself.

A. As to remittances, they deducted 5%. That deduction was from the total billing less credit.

I do not remember whether the 5% was deducted before the cash discount. The 5% applied both to purchases of

the leaf spring line and the coil action line. It applied to all purchases 1940 through 1945.

That kind of billing and payment with reference to Cotton States was changed in January of 1948, effective as of January 1, 1948 (Part 2, Page 211).

The 5% continued from the date we started in 1940 up until January, 1948. After January 1, 1948, they were the same as other accounts on coil action purchases. Between January, 1948, and the present time, Cotton States continued to take their 5% deduction from their remittance (Part 2, Page 212). During the year 1948, Cotton States was accorded on coil action purchases the terms set forth in the ordinary distributor contract. On purchases other than coil action, they obtained the 5% which was taken off when they remitted to Moog, except that an adjustment was made at the year-end to eliminate certain of the items that they had taken 5% on throughout the year. The final payment was reduced by the deductions made monthly (Part 2, Page 213). With reference to Cotton States during the year 1948 (the witness referred to Commission's Exhibit 28), throughout the year as they remitted to us in 1948, they deducted 5% from their remittances. At the end of the year we determined what their total coil action purchases, less returns and allowances, amounted to, reduced that by the cash discount and excise tax included in their billing price, ascertained the amount of net purchases subject to the merchandise bonus as a result of that calculation, which showed that they were entitled to a merchandise bonus at the rate of 10%. We applied our 10% on net coil action purchases, then deducted from that amount the 5% that they had deducted in error on their chassis parts and coil spring purchases for the year 1948 (Part 2, Page 214) then we remitted to them in accordance with those deductions for their annual volume. They obtained no volume rebate on their chassis parts and coil spring purchases because their volume was not sufficient, or those items were not included with the coil spring or coil action purchases in arriving at the coil action purchases subject to our merchandise bonus. That same type of billing and remitting continued throughout the year 1949, with respect

to the Cotton States Group. The Cotton States Group was accorded the benefit of the new spring schedule, effective July 1, 1949, and their remittances were changed to that extent (Part 2, Page 215). Our balance figures at the end of the calendar year 1949, reflected the change by the adoption of our leaf spring schedule. They still continued to take 5% off on each remittance during 1949. It is possible that we failed to keep working papers on Cotton States transactions for the year 1947. They may have been destroyed (Part 2, Page 216).

With reference to the Mid South Group during the period 1940 through 1945, when remitting to us on a monthly basis, they did not take a discount from the gross billing nor did they take a discount from the net billing less any credit that might be applied against the billing.

Q. Were they accorded periodically any sort of a rebate based upon the billings over a given period of time?

A. It was called a "commission".

That commission amounted to 5%. It was applied to all billings in the period from 1940 to 1945. It was sent to Mid South by check each six months period. I don't know whether that arrangement was in effect before 1940 because that was when I came to the Company. From my knowledge and inspection of the books of the Company, it seems to me that we started selling them in 1936 according to our records. The witness was then shown Commission's Exhibits 36A and B, 37, 38, 39 and 40 (Part 2, Page 218).

A change was made in 1945 when we allowed them a volume rebate on their coil action purchases on the same basis as our regular distributors.

Q. At the same time you provided them with a 5% rebate on all other products, did you not?

A. We made a few exceptions in our handling against or with respect to coil springs and chassis parts in the years 1946, 1947 and 1948.

Because in effect there was no volume rebate or merchandise bonus on the sale of those items.

Mid South did not obtain anything in the nature of a discount or rebate or allowance based on volume of their sales of those items until July 1, 1949 (Part 2, Page 219).

Between January 1, 1945 and July 1, 1949, we allowed them 5% on the purchase of the leaf spring line. We allowed them our regular merchandise bonus schedule on their purchases of coil action parts. We eliminated their purchases of chassis parts and coil springs and paid them no merchandise bonus or volume rebate on those purchases.

The witness was then handed Commission's Exhibit 21Z-10 and asked whether or not the information set forth therein would change his previous testimony, and the witness then reaffirmed his previous answer. During the period January 1, 1945 to July 1, 1949, Moog continued to remit the commissions semiannually (Part 2, Page 220). The semiannual payments made by us to the Mid South Group after July 1, 1949, were construed on the volume rebate schedule that we had in effect for our regular distributors. We have continued to make payments by check to Mid South since July 1, 1949, in accordance with the figures arrived at by the regular printed schedule but it seems to me the payment due to be made in July, 1950, was not made. We were not asked for it and since it was an arbitrary amount only, we felt there was no need for it (Part 2, Page 221). These payments since 1945, made in July of each year, were arbitrary amounts based on 5% of their total net purchases of all items. Asked to explain this, the witness stated: In the years prior to January 1, 1949, our July remittances were based on a total sale of all items less returns and allowances. We reduced the 5% and the net amount was made to them. Those amounts were adjusted later to the actual amounts due them in the annual remittances. The cash discount figured up to January 1, 1949, was deducted from the net purchases, the excise tax and the cash discount (Part 2, Page 222). By "net purchases" we mean purchases less returns and allowances and discounts. Then from that amount we deducted the excise tax and the cash discount. That gave us a net on which we based our 5% semiannual remittance to Mid South. Thereafter at the close of the calendar year we made a further remittance to Mid South, which remittances during the period January 1, 1940 to January, 1949, provided a balancing in figures with respect to the coil action items (Part 2, Page 223).

Q. That remittance would include, in the first instance, 5% on spring purchases, 5% on spring purchases for the remaining six months of the year, and then an item of 19% on the coil action, chassis parts and coil springs—

A. Not from 1940 to 1949.

Q. Well, will you explain then first what that year-end figure would include in 1945?

A. All right. Fiscal year 1945: The year-end figure would include 5% of the leaf spring line and the amount of the merchandise bonus that they would have been entitled to on the basis of their volume rebate at a discount rate or the rate called for by our regular franchise.

Q. Then in the calendar year ending in 1949 would that have been different?

A. In the calendar year 1949 they would have gotten the excess over 5% that was due them on the coil action purchases for the year 1949 and the regular merchandise bonus on leaf spring, as shown by our schedule for the year 1949 (Part 2, Page 224). We had a regular schedule for 1949. Our regular schedule on the leaf spring line discount was made effective on all purchases beginning with July 1, 1949. That was true in the case of Mid South distributors. We did not date it back to the first of the year 1949.

Asked as to whether the records of Moog showed about when an arrangement was first made with Ozburn, Crow & Yantis, the witness stated that the only information he had was the date they started selling them in 1936 (Part 2, Page 225). I do not know the terms accorded them between 1936 and 1940 with respect to discounts, allowances or commissions. I do not know whether they were periodically allowed anything in the nature of a rebate, discount, commission or other allowance because I saw no agreement dated prior to 1940. If there was one I saw no work sheet. Their billings were at the same prices as our regular distributors. Prior to 1940, when I joined the Company, I saw no remittance slips or any checks representing payments from Moog to Ozburn, Crow and Yantis (Part 2, Page 226). In the period between 1940 to January, 1945, Ozburn, Crow & Yantis deducted 8% on monthly remittances to us. I do not know whether that

8% deduction was made before the 2% cash discount was taken. That 8% covered all items purchased by Ozburn, Crow & Yantis between January, 1940 to 1945. In July of 1945 we allowed them 8% on their purchases of the leaf spring line, and 19% on their purchases of coil action parts. Prior to that date there was another schedule where the top on the coil action parts was 14% (Part 2, Page 227). Between January 1, 1940 and January 1, 1945, Ozburn, Crow & Yantis regularly deducted 8% from the billing in remitting to us.

Q. Thereafter you are certain of the terms as they appeared from July 1, 1945, but the period between January 1, 1945 and July 1, 1945, when the discount arrangements with Ozburn, Crow and Yantis was—

A. 14%.

Q. It was 14%?

A. On coil action parts.

Q. 8% on springs?

A. Yes.

The witness was then asked how the chassis parts and coil springs were treated in the period January 1, 1945 and July 1, 1945, and the witness stated they did not have them at that time.

A new agreement was made with Ozburn, Crow & Yantis in July of 1945. (Commission's Exhibit 23Z-1 and 23Z-2). (Part 2, Page 228). The terms of that agreement were not retroactive to January 1, 1945.

Q. Mr. Goetz, I would like to have you read what would be the third and fourth paragraphs on that page relating to cash discounts, so-called distributing commissions, and the other discounts, and tell us whether or not that expresses the manner of billing and payment of discounts that controlled the purchases of Ozburn, Crow & Yantis until that agreement was superseded.

A. Yes.

Q. The witness was then asked how were the Chassis parts and coil springs treated when they became a part of the line in 1945 until a new agreement superseded this agreement in the record as Commission's Exhibit 23Z-1 and 23Z-2?

A. In the years 1946, 1947, and 1948 the purchases of Chassis parts and coil springs, the deductions for purchases of those items were corrected by an elimination from the merchandise bonus due them on the coil action parts. No rebate or discount was accorded them on chassis and coil springs from July 1, 1945 until the agreement was superseded (Part 2, Page 229). From the period July 1, 1945 until that agreement was superseded, we sent them checks in payment of the commissions and rebates to which we may have made reference.

Q. In the first instance did Ozburn, Crow & Yantis take 8% from the remittances?

A. Again from what date?

Q. July 1, 1945 until that agreement to which we have made reference was superseded in 1949, or until it was superseded?

A. From January 1, 1945 to July 1, the remittance of July 10, 1949, they deducted the 8%. Thereafter they made no deductions in their remittances (Part 2, Page 230).

From January 1, 1945 to July 10, 1949, during that period when they remitted to us they deducted 8% from the remittances monthly. During July, 1945 we computed the purchases of the coil action parts in the first six months and figured the extra amount due them over and above the 8% deducted on their purchases of coil action parts.

Mr. Corkey: Which explains the balancing figures arrived at in 1945, which was just before the institution of a new volume rebate (Part 2, Page 231).

Mr. Goetz stated that the excess was 6% on their purchases of coil action parts in the first six months of that year. In January of 1946 we determined their coil action purchases for the last six months of 1945 and paid to them the difference between the 8% that they deducted and the 19%. The new schedule was not made retroactive to January 1, 1945 as far as Ozburn, Crow & Yantis was concerned.

For the years 1946 until July of 1949, during January, 1947, we computed the amount due them on their purchases for the last six months, purchases of coil action

parts for the last six months of 1946, and figured the extra amount due them, which was 11% on their purchases, and adjusted that amount by the 8% reduction on chassis parts and coil spring purchases. That is the 8% which they had theretofore taken out on the chassis parts and the coil springs, which was adjusted back in favor of us.

During 1949 our agreement with Ozburn, Crow & Yantis was changed from time to time. They were changed three times (Part 2, Page 233). This memorandum of June 14, 1949, was a tentative memorandum of a change that we intended to make in our agreement with Ozburn, Crow & Yantis relating to their purchases for the month of the leaf springs line. However, this was not effective. We made no change. In July of 1949 it was again changed; and later in August of 1949. When I say this July change I am not referring to Commission's Exhibit 23Z-4 and 23Z-5. That is the same as the letter of June 14th. On July 9th we got out a general bulletin to our trade in which the rates payable as a merchandise bonus are the same (Part 2, Page 234), but some of the provisions of the contract, or rather the general practice, are different in the agreement. I am now making reference to this bulletin of July 22nd. being Commission's Exhibit 5. I want to change my previous statement of July 9th. The date is July 22nd. On August 12th we again changed our rates with our customers in general and applied that also to Ozburn, Crow & Yantis in connection with the merchandise bonus payable on leaf springs. Then in December of 1949 we again changed our merchandise bonus to our trade in general and made that applicable to Ozburn, Crow & Yantis to all their purchases from July 1, 1949 (Part 2, Page 235). This Commission's Exhibit 23X, Y, and Z represents the contract with Ozburn, Crow & Yantis, effective from July 1, 1949, except for a change in schedule at the bottom of 23X and top of 23Y. There was no formal document covering that change. It was just understood that the schedule set forth on 23X and Y would be identical with the schedules set forth on the third page of Commission's Exhibit 1, indicating the schedule under the leaf spring line (Part 2, Page 236).

Washington, D. C., November 10, 1950.

ANTON M. GOETZ resumes the stand and testified further as follows:

Commission Exhibits 44 A to R, 45 A to U, 46 A to R, 47 A to Q, 48 A to T, 49 A to Q, 50 A to K, 51 A to M, 52 A to M, 53 A to J, 54 A to L, 55 A to K, 56 A to D were marked for identification.

Commission's Exhibit 23T is a letter that represents an amendment to the document known as Commission's Exhibit 23X, 23Y and 23Z. My recollection is that during the period 1940 to 1945 I know of no other accounts, other than Ozburn, Crow & Yantis, Mid South, and Cotton States that received anything in the nature of a rebate commission or allowance from the billings on leaf springs (Part 2, Page 238). My estimate of the number of distributors accounts in connection with coil action lines in the years 1947 to 1949 is approximately 1200. My estimate for the spring line is approximately 800, and my estimate for the piston ring line is approximately 400. There would not be too much variation. It could amount to as much as 10% but I would guess not as much as 15%. These figures do not include the people who hold Moog parts jobbers' agreeme ts or C. P. wholesalers' agreements because they are not our customers (Part 2, Page 239). On motion that part of the answer beginning with the word "because" was stricken as not responsive to the question (Part 2, Page 241). In arriving at the figure of 1200 it is possible that this total includes the members of Mid South and Cotton States Groups counted individually and added to the total because in this regard our calculations are taken from the catalogue requirements. That same thing would hold true for the springs as well as the coil action. I would say there is no general practice as to when Moog first instituted the practice of granting monthly volume rebates in connection with purchases of the spring line.

Q. Do you know approximately how many accounts during the year 1948 were granted a monthly volume rebate based on their total purchases of the leaf spring lines?

A. None which we consider volume rebates. By way of explanation there were three accounts that we con-

sidered commissions rather than volume rebates. They were Mid South, Cotton States, and Ozburn, Crow & Yantis.

Q. When you say "commission accounts" do you mean you were paying these accounts brokerage?

A. I wouldn't know how to answer that question. I would say that we call it "commissions" (Part 2, Page 242). To our mind the word "commissions" means a payment for certain services.

Q. A brokerage payment, Mr. Goetz?

A. A commission payment. I don't know what you mean by the term "brokerage".

Q. Was it a payment by Moog to a customer of Moog (Part 2, Page 243)?

A. Actually what I am referring to is the deductions made on remittances when sent by Ozburn, Crow & Yantis and Cotton States, and a payment made to Mid South.

Q. Mr. Goetz, what you term a "commission" in connection with the dealings with the Ozburn, Crow & Yantis and Cotton States, is it also called a commission when you deal with other accounts?

A. In regard to the other accounts, any allowances made them are termed as "volume rebates" or "merchandise bonuses" (Part 2, Page 245).

Q. But to Cotton States and to Ozburn, Crow & Yantis they are called commissions?

A. In the portion of the years between 1940 and 1945, they were in part charged to our commission accounts on our record and in part charged on merchandise bonuses and volume rebates.

What we term "commission is for warehousing and redistributing." The volume rebate or merchandise bonus is based on net purchases in a particular fiscal year (Part 2, Page 246).

In the period between 1940 and 1945 we were paying to Ozburn, Crow & Yantis and Mid South a commission on leaf springs.

Q. Was that commission paid in connection with goods the title to which had passed from your company?

On objection Commission's counsel withdrew the word "title" from the question.

A. Only in part was it a payment. The other part was deduction from remittances and it was paid on merchandise sold by us (Part 2, Pages 247, 248).

It is deducted in part and paid in part after the merchandise was sold to our customers (Part 2, Page 248).

Subsequent to 1945, Moog allowed many accounts the privilege of deducting 10% from the billings when making remittances in connection with spring purchases.

Subsequent to 1945 and before June, 1949, other than group accounts there was the Henderson Rim and Wheel Company on springs. That is the only one that I remember now. Subsequent to January 1, 1945 and prior to July 1, 1949 there were many accounts other than group accounts allowed a merchandise credit monthly based on volume of purchases. I could not estimate how many such accounts we had. I would not guess that there were more than fifty such accounts (Part 2, Page 249). I could ascertain the number of such accounts as of to-day. In 1947 there was possibly one account on springs. In 1948 there was one account on springs, and in 1949 there was only about one account. The period we are talking about is up to July 1, 1949. That one account is Henderson Rim and Wheel Company. During the period 1947 to 1949 there were other accounts that obtained volume rebates, either in form of a credit memorandum or deduction from the remittance, and other than group accounts, with reference to coil action (Part 2, Page 250). There weren't too many of them. I would make a guess and say not more than ten.

With reference to the first page of Commission's Exhibit 1 and to the words under the capitalized word "prices" the words "net prices" appeared. That means the prices appearing on the blue sheet in Commission's Exhibit 15 entitled "distributors' net prices". The blue price sheets in Commission's Exhibit 15 are in all cases the prices referred to by the term "net prices" in the distributor contract.

At one time the Company did employ the zone system of pricing in the sale of the leaf spring line (Part 2, Page

251). It does not now employ the zone system of pricing in the sale of its leaf spring line. It ceased to employ the zone system of pricing in approximately August, 1949. It has been the practice of the Company in selling to the ordinary distributor accounts to generally adhere to the merchandise bonus schedule set forth in the form contract, which is here in the record.

I heard some previous testimony with respect to letterhead contracts. Since 1940 I believe there actually were three. They were Mid South, Cotton States, and Ozburn, Crow & Yantis.

Q. Do all three currently operate under letterhead, so-called letterhead contracts?

A. Only one (Part 2, Page 252).

Mid South and Cotton States ceased to operate under so-called letterhead contracts effective as of July 1, 1949.

The leaf spring line in 1947, which includes chassis parts and coil spring sales, were somewhat less than 50% of the total sales for that year. As to the coil action line, it approximately comes to less than 50% for that year. As to the piston ring line, it was about 7½% of the total for the year 1947. My figures just given for the year 1947, with reference to the leaf spring line, include the chassis parts and coil springs (Part 2, Page 253). The leaf spring line and the coil action accounted for 46 or 47%, respectively. That is about right.

The witness was then shown a card and asked whether or not he was familiar with it. He stated it was a card used to accumulate sales statistics. They were prepared from accounting department data but are not used by our accounting department. They are used for our sales department. As to whether they are substantially accurate on the question of our sales, in many respect they are, with the exception that they had changes in the handling of these accounts with respect to customers' branch stores, in various years. The sales figures set forth on those cards are taken down to the nearest dollar figure (Part 2, Page 254). In my opinion the figures on these cards reflect with reasonable accuracy the sales of Moog products during the years 1947, 1948, and 1949, with the exception that I made to you in my answer to the previous question.

Explaining the changes that took place with respect to the branch store sales analysis, in one of the years the cards included shipments only to the customers' particular point or place of business shown on the card. In another year the cards showed all shipments not only to that point or to that place of business, but also to that particular customer's customer. In other cases, where the customers had branch stores in some years, even though the branch store sales were charged to that particular customer at that location, the card in one case would show total sales or shipments to that particular branch, I mean to that customer and its branches, and in other cases the card would show only the shipment to that particular point.

The witness was shown a branch sales card for 1948 and stated that that particular card shows the card of a member of Cotton States and shows the total of the sales to that member and its branches (Part 2, Page 255).

These sales cards are a part of a Wheeldex system. It is the practice of the Company to remove cards from the Wheeldex, so that the net sales for the years 1947, 1948 and 1949 that were turned over to the attorneys for the Commission at the first hearing in St. Louis may not have all the accounts to which the Company sold during the years 1947, 1948, and 1949 (Part 2, Page 256). When cards are removed from the Wheeldex System, for a limited number of years the active cards at the end of a given year are kept. The old cards, accounts that discontinued buying from us in a particular year, were not kept.

The document marked Commission's Exhibit 44 Series, A through R, is a summary of the merchandise bonus credit memorandum issued during the year 1947 in connection with the coil action division, and was prepared under my supervision. It represents a summarizing of all credit memorandums that were issued in that year on merchandise bonuses. This document, marked "Commission's Exhibit 45, Series, A through U" represents a summary of merchandise bonus and credit memorandum issued during the year 1948 in connection with coil action purchases (Part 2, Page 257). And Commission's Exhibit 46 represents the identical material for the year 1949.

Commission's Exhibits 50, 51, and 52 represent the identical material with respect to the piston ring division during the years 1947, 1948, and 1949. Commission's Exhibit 56 represents both payments to our customers, deductions from their remittances, and credit memorandum issued on leaf spring items for warehousing and redistributing commission (Part 2, Page 258).

The series of documents which have been marked as Commission's Exhibits 47, 48, 49, 53, 54, and 55 series, are a list of the customers who received credit memorandums from us on their purchases of coil action parts and piston rings during the year 1947 through 1949. Those exhibits bear a direct relationship to the documents marked as Commission's Exhibits 44, 45, 46, 50, 51 and 52 series. By way of explanation of relationship on the schedule on which the names are listed, we show the credit memorandum number or a key number which will also be shown on the summary, on the schedules Commission's Exhibits 50, 51, 52, 44, 45, and 46. On these series of exhibits there is a number in the left hand column which refers to a corresponding number in these series of exhibits, on which the names and addresses of the parties are set forth (Part 2, Page 259). To the right of the identifying number, there is a date which signifies the date on which the accounting department actually issued its credit memorandum. To the right of that there is a column of figures under the title of "Purchases". That signifies the amount on which our merchandise bonus or payment was based, and it represents the net purchases by the customer for the particular fiscal year, less, in a number of years, cash discounts and Federal excise tax. Immediately to the right of that there is a column headed "Rebate". That represents the actual amount of the credit memorandum that was issued. To the right of that there is a column headed with the word "Per Cent". That is the rate which the particular customer received on the basis of his purchases of specified parts during a particular fiscal year. To the right of that is a column headed "Contract Period" and then underneath that "M. V. R." The contract period is the fiscal year, M. V. R. is an abbreviation for Monthly Volume Rebate (Part 2, Page 260). As to the contract period, not all of our agreements for fiscal years ended

at the same time—it depends. The beginning date is usually to be considered the first of the month in which we make the first shipment to the customer, to a new customer. And where instead of a date the letters appear in these exhibits, they represent in the main the allowances given to customers for redistributing, for warehousing and redistributing commission, which, in part in one period was an advance, was considered as an advance payment of the merchandise bonus rebate and in another period was considered as an official bonus payment.

Q. And in what period was it considered as an official bonus payment?

A. Beginning with the year 1950; so it would not apply to this (indicating). In this period it was considered as being an advance payment of the merchandise bonus in most cases. I have made particular reference to Commission's Exhibit 51B. My comments hold true throughout the rest of these exhibits (Part 2, Page 261).

Commission's Exhibit 56 series differs from the other Exhibits that I have just referred to in that it represents in the main deductions made by Cotton States and Ozburn, Crow & Yantis from their monthly remittances; payments to Mid South and Credit memorandums issued to Henderson Rim & Wheel Company for warehousing and redistributing. The make-up of this series of exhibits differs from the exhibits to which we have previously made reference, in that we have a list of names and following we have the credit memorandum and payments of record that were listed for each year, together with the reference number on the remainder of Commission's Exhibit 56 series, being 56 B through "D".

Q. Referring back to the particular parties noted on Commission's Exhibit 56A, is that correct? (Part 2, Page 262.)

A. That is correct (Part 2, Page 263).

Thereupon Commission's Exhibits 44A to "R" inclusive, 45A to U, inclusive, 46A to "R" inclusive, 50A to "K" inclusive, 51A to M inclusive, 52A to "M" inclusive and 56A to "D" inclusive were offered and received in evidence (Part 2, Page 264).

Thereupon Commission's Exhibit 47A to "Q" inclusive, 48A to "T" inclusive, 49A to "Q" inclusive, 53A to "J" inclusive, 54A to "L" inclusive, 55A to "K" inclusive were offered and received in evidence, subject to being held by the Commission, in their confidential files, for inspection by the attorneys for the Commission, attorneys for respondent, the Trial Examiner, the Commission and any of its employes, and for certification to any appellate court in the event of any appeal taken in the proceeding (Part 2, Page 265).

In my testimony relevant to the number of accounts purchasing the coil action line, I was referring to accounts which buy in accordance with the terms set forth in Commission's Exhibit 1, or the particular document of like character that was effective at any given time, I did not include in that total figure any of the accounts on which we might hold agreements similar to the Moog Parts jobber agreement, being Commission's Exhibit 11 (Part 2, Pages 267, 268).

Q. Mr. Goetz, you had some testimony with reference to the outlets, the automotive parts outlets, that hold contracts similar to Commission's Exhibits 10, 11, and 12. Now I want to ask you with reference to the first order in the month which some of these outlets may send to Moog, is that your understanding of a permissible practice?

It does not apply to a C. B. wholesaler, which is Commission's Exhibit No. 10, nor does it apply to Commission's Exhibit No. 13. It applies only to Exhibit 11, and the previous agreement to 11, known as Exhibit 12 (Part 2, Page 268).

Q. Upon receipt of those orders and the shipment to the people who have given to Moog the orders, does the invoice go back with the order?

A. The order is received from the distributor and the invoices are sent to the distributor.

Q. I thought you testified they order directly from Moog.

A. No.

Q. I thought you just testified to that; that at least they made one direct order to Moog per month.

A. Didn't you talk about "shipment" instead of "order"? Will you clear up that first question, please?

People holding agreement similar to Commission's Exhibits 11 and 12 are not entitled to make one order a month directly to Moog. Under no circumstances can they order directly from Moog.

Exhibits 10 and 13 have no reference to any first order in any given month. With reference to Exhibits 11 and 12, the first shipment made to that account on the basis of an order received from the distributor is taken into consideration on their warehousing and redistributing commission. The order in all cases comes from the distributor but it is possible that a "Missionary Man" may have worked with this particular customer, meaning the customer holding contracts known as Exhibits 11 and 12. When a "Missionary Man" takes an order, he takes the order to the distributor (Part 2, Pages 270, 271).

The distributor then signs that particular order as being chargeable to him or gives us his purchase order.

On all shipments in reference to those orders the distributor is charged in accordance with the blue price sheet. The particular outlet receives nothing except a packing slip. The billing goes to the account holding the distributor contract (Page 271).

The significance of this program is that the distributor receives the warehousing and redistributing commission on the first order.

This is a limitation placed more on the distributing account than on the account holding the contract similar to Commission's Exhibits 11 and 12 as far as the warehousing and redistributing is concerned.

When talking about the warehousing and redistributing commission I am talking about the plan as set forth in Exhibit 2. There is no first order requirement in the plan of Commission's Exhibit 3 (Page 272). Exhibit 3 was changed by Exhibit 2 in respect of the first order, is superseded Commission's Exhibit 3. Exhibit 2 was first made effective April 30, 1950. The program was made effective in December, 1949. That is the program epitomized by Exhibit 2. That applies to all of our lines (Page 273)

Exhibit 3 was in effect from about December, 1949 to about April, 1950. In part there was a similar agreement in effect prior to that date and in part it had been in effect since 1940 to my knowledge. By that I mean that only certain accounts had operated under a program similar to that illustrated in Commission's Exhibit 3 (Page 274). There were about four such accounts from 1940 to about 1948 but that is just a guess of mine. In 1948 there were a greater number, but how much greater I don't know.

I had reference to Ozburn, Crow and Yantis, Mid South Cotton States and Henderson Rim & Wheel.

On Exhibit 56-B, under the percent column, there appears the entry of 5 and 10%. There was in this particular case a warehousing and redistributing commission of 5% allowed on certain car manufacturers' parts; and 10% allowed on other manufacturers' allowance. I don't know now the car manufacturers' parts that were entitled to the 5% and the 10% (Part 2, Page 275).

With reference to the first entry on Commission's Exhibit 44F, which bears the number 355, and then making reference to the corresponding entry on Commission's Exhibit 47E, with reference to a credit memorandum that was issued to a customer for the merchandise bonus that was due him on his purchases for the fiscal year ending December 31, 1936. The purchases listed, with reference to this No. 355, total $169.18. There was not at any time a general offer of 9% merchandise bonus for purchases as low as $169.18. By way of explanation that particular account who received this memorandum was a member of the affiliated group whose purchases were combined for the purpose of the volume rebate (Part 2, Page 276). This group does not appear in the list of groups that are in the record in Commission's Exhibit 30 series (Part 2, Page 276). When we first undertook an arrangement with that group of which that customer was a member, I don't know. We have been selling that concern for a considerable number of years. Actually it is a group of companies whose controlling stock is owned by one individual. I don't know who the affiliated companies are at this time but I know there are many of them. They are located in

several states, I believe North Carolina and South Carolina.

Q. Each one of the outlets obtains, or has obtained, from your company the merchandise bonus each year as a separate entity?

A. No; each one of the outlets, because that is one of the concerns, I believe, that has branches as well as affiliated companies so that the outlet—Possibly the main stores in several of these cases are the affiliates. Each of the affiliates would receive a merchandise bonus credit, but not the branches (Part 2, Page 277). As to the particular name associated with the group, in the main the names are Piedmont, but they are not Piedmont in all cases. The group as a unit has no particular name or designation. They exist for the most part in North and South Carolina.

Q. Having reference now to this outlet, Piedmont Auto Exchange, Charlotte, North Carolina, does the merchandise credit indicated here represent the shipments to that particular outlet of this group, represent the bonus on the shipment to that particular outlet of this group?

A. I would not be able to answer that question without referring to that particular credit memorandum; but on the basis of the amount of purchases, I would say "Yes".

These affiliates do not operate from a warehouse. The orders are received and the shipments are made to the individual affiliate.

Q. And the merchandise bonus is paid by your company to the individual affiliate based on the volume of the purchases of all of the affiliates? (Part 2, Page 278.)

I believe I originally made the statement "Yes" to the first point of your question. I do not know whether this is carried out through this entire period or not. It is possible that the merchandise bonus memorandum may all go to the principal store or principal company, which I believe is in Charlotte, North Carolina, but it is based on the combined purchases of the group of all of the affiliates.

The witness believed that the group of outlets involved in this series of questions were separate corporations as

well as branches involved (Part 2, Page 279). But the purchases of these separate corporations are aggregated for the purpose of determining the merchandise bonus to each of the companies involved.

In explanation of an apparent discrepancy between total purchases and the percentage rebate applied Commission's Exhibit 44K, and the entry opposite the number 1072, and a corresponding entry on Commission's Exhibit 47J, that is either a branch of another company or is owned by another company, or there is an affiliation with another company. I don't know exactly. That is an apparent as distinguished from a real discrepancy (Part 2, Page 280).

With reference to Commission's Exhibit 44J, and particularly item number 1076, and the corresponding entry on Commission's Exhibit 47J, by way of explaining the apparent discrepancy there, that is a company which is owned by another company. The name of the company that owns it is Borbein-Young & Company. Our company aggregates the purchases of Illinois Wheel & Brake Company with those of the Borbein-Young Company for the purpose of determining the merchandise bonus accorded; and has followed that practice from the beginning of our coil action merchandise bonus schedule. Borbein-Young & Company have several branch stores and these several branch stores combined their purchases so that the purchases reached the top point of the bracket. The bonus to those stores is treated as one bonus because all accounting records are at St. Louis (Part 2, Page 281). Over and above that merchandise bonus and entirely apart from it, the merchandise bonus is accorded to Illinois Brake & Wheel and is treated separately for the purpose of the merchandise bonus. The witness was then shown Commission's Exhibit 30C, for the purpose of refreshing his recollection, and asked if he recalled the manner in which the merchandise bonus was handled with respect to that group of jobbers from 1947 to 1949 (Part 2, Page 282). And the witness stated that with reference to the schedule for 1947, that the credit memorandums were made out to the individual members of the corporation. Why they were made out in that manner, I have no

recollection at this time, and the figures set forth on Exhibit 44K represent the purchases of the individual members rather than the total of the shipments to the group.

With reference to the policy of the company with respect to aggregating purchases by affiliating companies or by subsidiary companies for the period between 1947 to 1949, the purchases of such companies were consolidated in ascertaining the merchandise bonus by us to them, regardless of the fact that orders came directly from affiliates and shipments were made directly to affiliates (Part 2, Page 283). The basis for determining who might be accorded the right to aggregate purchases in this situation occurred wherever there was an individual or a company owning a controlling interest in other companies, or where there were subsidiaries involved.

Q. And provided they demanded an aggregate?

A. No; it was automatically made where it was known to us. A controlling stock interest was sufficient.

Q. Would it have been sufficient in the case of parcelling between more than one company with less than a controlling interest?

A. Well, if we could establish that there was control or if we had information to believe there was control, we would aggregate the purchases, or a common interest somewhat less than control (Part 2, Page 284).

The witness' attention was called to Commission's Exhibit 44K, and particularly the item numbered 1070, and the corresponding item on Commission's Exhibit 47J, and asked to explain the apparent deviation from the normal operation of their merchandise bonus policy. The witness stated that the particular item related to Number 1072, and that they aggregated the purchases of the two in accertaining the volume or the merchandise bonus; that it was the company's understanding there was some connection between the two.

The witness' attention was called to Commission Exhibit 45H and the item Number 2103 thereon, and the comparable item on Commission's Exhibit 48G, and asked to explain the apparent discrepancy with reference to the normal volume rebate schedules. The witness stated that the pur-

chases of that customer, he believed, were combined with the purchases of another customer and he believed there was a common interest between the two concerns. That it would not be attributable to the fact that this customer also purchased a volume of piston rings (Part 2, Page 285). The name of that company is Missouri Auto Supply Company, and the Columbia Auto Supply Company was at one time a branch of Missouri Auto Supply Company. I believe they now operate as separate and distinct entities, but we do not continue at this time to so combine them. At the time of this merchandise bonus in 1948 the Company aggregated their purchases (Part 2, Page 286). I believe at that time there was an affiliation between them.

The witness was referred to Commission's Exhibit 45J and the entry number 2227 and the equivalent entry on Commission's Exhibit 48-I, and asked to explain the apparent deviation from the normal operation of the bonus schedule. The witness answered by stating that his answer to one of the previous questions was wrong, and that this was the company that was owned in part by the other company. By "other company" he meant the Columbia Auto Parts Company, or there was an affiliation of some kind between this company and the Columbia Auto Parts Company.

Q. So that at this period of time this company is represented by the entry 2227 and the Columbia Auto Parts were treated for the purpose of a merchandise bonus as a single operating unit?

A. Yes; at one time all three were, as I mentioned, because there was a common ownership between all three of them (Part 2, Page 287).

The witness was shown Commission's Exhibit 45-O and the entry number 2991 and the corresponding entry on Commission's Exhibit 48N, and asked to explain the apparent discrepancy in that rebate. The witness answered he believed that the purchases of that particular company were also combined with the Borbein-Young Company and Illinois Wheel & Brake Company because he believed there was a common interest between the three companies; that he did not know the extent of that common interest,

and the company to which they are now making reference order directly from Moog.

Q. And shipments in response to such orders are directed to the company?

A. I don't know whether the Peoria Wheel & Rim is a branch or whether it is a separate, incorporated Company.

As to whether orders are received directly from the customer and shipment made directly to the customer, the witness stated he could not give the answer to that (Part 2, Page 288).

The witness was shown Commission's Exhibit 46R and the entry Number 5975 and the corresponding entry on Commission's Exhibit 49Q and asked to explain the apparent deviation from the normal operation of the bonus. The witness stated that that concern had a common interest with another concern he did not recall, and that the purchases of the two were combined as one purchase. The witness stated that he did not know whether that could have been a balancing figure to account for the period prior to the inception of the buying group known as Six States Associates. Asked whether it would be possible that might have been such a figure, the witness replied: "Yes; it could have been".

The witness' attention was directed, for the purpose of refreshing his memory, to Commission's Exhibit 30-O, and asked whether it made clear the number 5975 entry on Commission's Exhibit 46R. The witness stated that it represented a credit memorandum issued to that customer on its purchases for a period of part of the year (Part 2, Page 289). That was done to this particular company because they stopped buying from us and thereafter we received purchase orders from Six States Associates (Part 2, Page 290). We continued to ship the products to the various addresses on the basis of the purchase orders received from Six States Associates. During the years 1947 to 1949, when our company undertook to sell to a group-buying organization it was customary for us to balance out the purchases previously made by the individual members. We would take the purchases of that particular customer for the portion of the year that he had bought

from us and would determine the number of months that that represented and arrive at their estimated annual purchases on the basis of their actual purchases for that short period. We would then apply to the actual purchases for the short period the rate that we determined by the total of their aggregate, estimated, annual purchases (Part 2, Page 290).

The witness was then asked with reference to the return on the subpoena duces tecum with respect to Automotive Group Buyers was there anything further available in respect to prices and terms accorded on sales that inadvertently had not been returned at the first hearing (Part 2, Pages 290, 291). The witness answered that the only things he knew of that might have been found were some sales stub cards that Mr. Steele and he had worked with; that nothing else other than that has turned up (Part 2, Page 292). The witness further stated that when he referred to sales statistics he had reference to the green sales statistical cards over there (indicating) and did not refer to any of the work sheets that he had returned in response to the subpoena (Part 2, Page 293).

Cross-Examination was waived (Part 2, Page 294).

March 23, 1951 at New Orleans, Louisiana

(Part 2, Page 296).

JOSEPH N. GREINER testified as a witness on behalf of the Commission.

Direct Examination.

My name is Joseph N. Greiner, Greiner Auto Parts Company, Inc., 2929 Magazine Street, New Orleans, Louisiana. I am Vice-President and have held that position approximately three years. The general area in which we offer our products for sale is the City of New Orleans, proper, and a hundred mile radius (Part 2, Page 297). We travel four salesmen that cover the general trade area we have described. I am here in response to a subpoena. The

products we sell are purchased primarily from manufacturers. Some lines I have to buy through other jobbers here in town. We sell automobile parts manufactured by Moog Industries. We purchase these parts from them.

Our products are offered for sale to the independent garage men, service stations, fleet owners, and I offer them to the car dealer but the only time I can sell him is when he can't get it from his original source. We buy our lines from approximately seventy-five manufacturers (Part 2, Page 298). The number of parts that would entail is approximately 10,000. We have competition in our trade area. We compete primarily with original equipment car manufacturers and their agents, the oil companies and the tire companies; theoretically, we are in competition with the other jobbers, but it doesn't amount to much. I do not know if any car dealer in the New Orleans area offers parts for sale manufactured by Moog Industries. We purchase the front end suspension line and springs from Moog Industries. We belong to a buying group named Cotton States, Inc. It is located at Greenwood, Mississippi (Part 2, Page 299). We purchase parts from Moog Industries through Cotton States, Incorporated.

Q. Mr. Greiner, would you tell us the terms of purchase on the items which you purchased from Moog Industries, Inc., during the year 1949?

A. If I remember correctly, we bought off the blue sheet, and then off the rebate schedule, according to volume purchases. I cannot recall what that rebate amounted to. I could ascertain it. I know approximately what it is. I have ascertained that the gross amount of purchases of our company from Moog Industries for 1949 was approximately $3,000.00 (Part 2, Page 300).

The rebate received by the Greiner Auto Parts Company on those purchases was approximately $250.00.

Our approximate gross sales in the year 1949 were approximately $400,000.00. As to the percentage of those sales that were made to the car dealers in our trade area, I do not know, but the percentage is mighty mighty small. The large bulk of our sales in 1949 were made to garages and repair shops. Other jobbers in the New Orleans area

compete with us for the trade of the garage men. We bought from other jobbers in the New Orleans area in 1949, approximately $25,000.00 (Part 2, Page 301).

We purchase all Moog parts direct from the Moog factory. Moog Industries offer a cash discount based upon prompt payment of their bills. During 1947, 1948 and 1949, we availed ourselves of that cash discount, which, to the best of my knowledge was 2% (Part 2, Page 302). We do not sell Moog products to any other jobbers in the New Orleans area.

There was no cross-examination.

ALMON G. BARDIN testified as a witness on behalf of the Commission.

Direct Examination.

My name is Almon G. Bardin of Auto Shock Absorber Sales, 1020 Richards Street, New Orleans, Louisiana. I am proprietor and am here this morning under subpoena. We offer our products for sale in the Metropolitan New Orleans area. We do not travel full time salesmen (Part 2, Page 303). We have a part time salesman and part of the time I solicit business myself. We buy part of our products direct from the manufacturers and part we buy as a subjobber through other jobbers, locally. About 50% of our total purchases are made through other jobbers in this area. We purchase products from Moog Industries, Inc. and did so in 1949, to the best of my knowledge, as well as in 1950. We offer our products for sale to the independent repair man and I do some retail business also. I do not actively solicit business from any other jobbers. Occasionally, however, they pick up from me when I have it and they don't. It is more or less of an emergency nature for them. I do not belong to any buying group (Part 2, Page 304).

We offer for sale approximately seven manufacturers' lines. As to how many individual parts there are in the coil action line, all the nuts, all the bolts, I could not answer that question. I don't know how many different

parts there are, because there are about 200 different items in the coil action part alone for different makes of different cars and different models of different cars. I do not think it would run into the thousands. I would say that my answer applies to all of the lines I carry and is not restricted to the coil action line alone. We purchase from Moog Industries coil suspension parts, coil springs, some leaf springs, some king bolt sets and tie rod ends (Part 2, Page 305).

Our gross sales in 1949 were approximately $50,000.00. As to the total amount of purchases we made from Moog Industries in 1949, I do not have that information readily available. I am a small operator and I have an accounting service that keeps my books and they have all of the papers. The information could be secured for you if it is required. I received a rebate from Moog Industries on my purchases for 1949. We have competition in the New Orleans area in the sale of our products. We compete with other automotive jobbers but my biggest competition is the original equipment parts manufacturer (Part 2, Page 306). I know of no car dealer or original equipment manufacturer that offers Moog parts for sale in the New Orleans area. Moog Industries offered a cash discount for prompt payment of its bills in 1949. That was 2%. Insofar as possible we took advantage of the cash discount for prompt payment offered by Moog in 1949 (Part 2, Page 307). I take advantage of the 2% cash discount from a selfish reason because 2% is just two cents less on each dollar's worth of bills I have to pay, and it enables me to break even, because I allow a 2% cash discount to my customers for prompt payment.

Cross Examination.

As to how much of my business is retail percentagewise in relation to Moog business is a rather difficult question to answer, because when we sell the parts retail they are installed on the car and when you do that it is usually quite expensive. It would be merely a guess, but I would say that about 10% of the parts of the Moog line are sold at retail (Part 2, Page 308). My customers do not always take advantage of the 2%. Many of them do not. There

are many times when I do not find myself in a position to take advantage of the 2% discount.

LEE JOSEPH PICOU testified as a witness on behalf of the Commission.

Direct Examination.

My name is Lee Joseph Picou, Auto Springs and Brake Service Company, 1035 Carondelet Street, New Orleans. I am half owner (Part 2, Page 309). I have been connected with the business since February 1, 1948, and am here in response to a subpoena. We offer our products for sale in all of Louisiana and part of Mississippi. We travel three salesmen. At the present time I have only one out of town man. He covers everything except New Orleans. We offer our products to the general garages, jobbers, service stations and fleets. We have competition in the sale of our goods, in our trade area. We compete with other jobbers but our greatest competition is the car manufacturer. Chrysler and General Motors would be the biggest. We purchase our products from about fifteen different factories. We are warehouse distributors for about fifteen different factories. We offer quite a few general lines for sale (Part 2, Page 310). It would be hard to tell you exactly how many, but there are approximately about thirty.

Q. Could you approximate the number of individual parts, that is, the parts that you sell as individual parts, that would be?

A. It would run way up. The Midland, manufacturers of power brakes, they alone have about 2,000 component parts that we handle. All the little springs and washers and valves and things like that. There is a tremendous amount of them. We do not belong to any buying group.

In 1949 we did not purchase any merchandise from Moog Industries. In 1948, we did purchase from Moog Industries (Part 2, Page 311). Our total sales in 1948 were approximately $250,000.00. In that year we purchased from Moog Industries $6,192.69 (referring to a file

brought with him). No car dealer in New Orleans, or r general trade area, offered Moog products for sale in 48, to my knowledge. In 1948 we received a rebate on r purchases from Moog Industries of $303.44. That figres in percentage 7½%. In 1948 we purchased from oog Industries front end suspension parts, coil action nd springs. In response to a question as to whether Ioog Industries in 1948 offered a cash discount for prompt ayment, the witness answered "That was offered in 947" (Part 2, Page 312). The witness was referring to letter from Moog Industries, which was marked "Commission's Exhibit No. 57". We took advantage of the cash iscount offered to us. As to why we take advantage of he cash discount, we pass it on to our accounts receivable nd it gives them an incentive to pay their bills by the 0th of the month (Part 2, Page 313). The cost of acquisiion of goods of the Moog line is important to us (Part 2, ages 313, 314).

Q. The 2% cash discount, which is offered by Moog, elates to your cost of the Moog line, does it not?

A. My volume discount means more to me than the 2% does. That is the only way I can meet competition n town, as we have these dealers, like I told you, to buck up against that are very rough. Anything they handle, they can undersell us. That is why we look for any discounts that we can get. It is all needed in order to help us come out (Part 2, Pages 314, 315). I imagine that if we take the 2% cash discount it means we pay 2% less for our goods to Moog. Commission's Exhibit 57 was taken from our files. It was received in 1947 by John P. Otis, who was the owner of the company at that time. I wasn't there then. As to the meaning of the handwriting on it that is Miss Potter's and Mr. Harvey's. Miss Potter was the secretary and Harvey was the bookkeeper (Part 2, Page 315). Thereupon, Commission's Exhibit 57 was offered and received in evidence (A form letter) (Part 2, Page 316).

Q. Do I understand from your testimony a moment ago that all discounts, whether they are trade discounts or cash discounts, are important to you in determining your overall profit or loss situation?

A. That is right (Part 2, Page 317).

Cross Examination.

We always take the 2% cash discount from Moog (referring to his file). Approximately 10% of our sales are retail business.

Q. The rebates which you receive on the Moog purchases are comparable to the rebates you receive on the other purchases, all the other manufacturers' lines?

A. I'd say "Yes", that isn't on all lines, though, because all lines do not give volume rebates. We have a few that give you a volume discount, but all of our manufacturers do not. It is based on a manufacturers' price to us as a warehouse distributor and it carries nothing but a 2% on the 10th of the month (Part 2, Pages 318, 319).

We no longer are a warehouse distributor for Moog. We were a warehouse distributor for Moog at the time these rebates were received up to the end of 1948. Moog paid us nothing in addition to these rebates for being a warehouse distributor.

Q. Some manufacturers gave you a warehouse distributors' rebate; Moog gave you a volume rebate; is that correct?

A. No; I didn't say that they gave us a warehouse distributors' rebate. I said, "Some give a rebate." That is a volume rebate. Some don't give us anything at all.

Q. For being a warehouse distributor?

A. You take Midland, for instance. We are a warehouse distributor for them. We are the sole distributor of Midland; we buy strictly on a flat rate basis. They make a price to the distributor and that is it. There is no discount, no freight paid, or nothing, and we are a warehouse distributor for Midland.

The price we pay to Midland is not the same price that the jobber pays to Midland. We sell the jobber. Midland does not sell the jobber.

Q. Is the price that Moog gives you on the volume rebate, is that the same price that he sells to the jobber?

A. I don't know (Part 2, Page 320).

CLEM J. SPORL testified as a witness on behalf of the Commission.

Direct Examination.

My name is Clem J. Sporl. I am the owner of Auto Chassis and Spring Company, 429 Esplanade, New Orleans. I have been owner about two years. We offer our products for sale in Orleans Parish (Part 2, Page 321). Our general line of business is springs, front end parts, chassis parts. We do not travel salesmen. I am here under a subpoena.

We offer our products for sale to the garage, service station and fleet owner. We carry approximately five lines of parts. As to how many individual parts there are approximately, it would be in the thousands. We purchase products from Moog Industries and offer them for resale in this general area. We have competition in this area. We compete with local jobbers and dealers (Part 2, Page 322). I do not think, to my knowledge, that any car dealer offers Moog parts for sale. We do not resell Moog parts to any other jobber in this area. We purchase from Moog Industries leaf springs, chassis and coil action parts. We receive a rebate from Moog Industries on our purchases. In 1949 we received a 5% rebate. We do not belong to a buying group. Moog offers a cash discount for prompt payment of bills amounting to 2%. We take advantage of the cash discount because we pass it on to our customers. They take advantage of the same thing to us (Part 2, Page 323).

Q. Does whether or not you take your 2% for cash from Moog relate to the cost which you pay Moog for your products?

A. I would say "yes".

Our gross sales in 1949 were between Twenty-five and Thirty Thousand Dollars.

Cross Examination.

Our competitors, the car dealers, sell leaf springs, chassis and coil action parts in Orleans Parish in competition with us (Part 2, Pages 324, 325).

Q. In competition with Moog parts?

A. No; we have a few dealers we are in competition with but it is all equal. We don't have no heavy competition on it (Part 2, Page 325).

Q. Does the car dealer sell a leaf spring which can be used in the place of a Moog spring?

A. Yes; they can.

And the same is true for the chassis and coil action parts.

The car dealers are our heaviest competition.

I don't know what our gross purchases with Moog were last year. In 1949 from Moog it was $1,687.68, which is a net purchase figure (Part 2, Page 327). I don't know what that figure would be in gross sales as related to Moog parts. Our average mark-up on Moog parts is about 30%. That is, a 30% mark-up from the blue sheet. We got a 5% discount from the blue sheet and we also took a 2% cash discount; so our total mark-up would be about 37% (Part 2, Page 328).

Q. Your rebate and your cash discount are relatively unimportant compared with the 30% mark-up?

A. It is important. The rebate is important.

The rebate is not more important than our mark-up nor is the cash discount more important than our mark-up (Part 2, Page 329). About 10% of our business is retail. As to the mark-up on the retail business, I could hardly say. We rebuild springs. We use very little merchandise in it. I never did figure up the mark-up. However, we do not sell the spring at retail for the same price as we sell it to the jobber.

Q. What would be the difference in price between the jobber price and the retail price?

A. We have different sheets Moog sent us. We go by the pink sheet, jobber sheet.

Q. You don't know how much more that is?

A. No; I didn't figure it out.

March 27, 1951, at Memphis, Tennessee.

ROBERT R. MEADOWS testified as a witness on behalf of the Commission.

Direct Examination.

My name is Robert R. Meadows (Part 2, Page 333). I am Vice-President and General Manager of Mills-Morris Company, 173 South Dudley, Memphis, Tennessee, wholesalers in automotive parts, and am here under a subpoena.

We handle about 500 general lines of manufacturers' equipment, large and small. The number of individual items or parts that we sell I would say is in the vicinity of 50,000 or more (Part 2, Pages 334 and 335). We purchase our products from manufacturers. They are our sole source of supply for automotive parts with a very few exceptions. The exceptions would be from some other wholesaler—distributor—or warehouse, distributor.

Q. Would you purchase from the distributor you mention, and as a jobber of those parts yourself? (Part 2, Page 335.)

A. The jobber; yes.

We offer our products throughout the State of Mississippi except the extreme southern part of the State. In eastern Arkansas, middle Tennessee, and western Tennessee; two counties in southeast Missouri and about two counties in Western Kentucky. Memphis, Tennessee, is included in West Tennessee. We operate and maintain eight stores. They are located in Memphis, Nashville, Union City, Tennessee, Milan, Tennessee, Jonesboro, Arkansas, Tupelo, Mississippi, Greenville, Mississippi and Jackson, Mississippi. We travel thirty-two salesmen at present and they cover the general trade area I have outlined (Part 2, Page 336). We offer our products to service stations, garages, car dealers, and small jobbers. In offering our products to small jobbers, we act as a distributor. We have competition in the sale of our product in our trade area. We compete with car manufacturers, through the car dealers, and other jobbers throughout the area.

We purchase from Moog Industries and did so in 1949. In that year we purchased flat springs, leaf springs, coil

action parts and piston rings (Part 2, Page 337). We purchased through Mid South Distributors.

As to the discount or rebate we received from Moog Industries on our purchases in 1949, I do not know the exact figure. That information would be found with Mid South Distributors. I don't know the different brackets (Part 2, Pages 338, 339). Our total purchases from Moog in 1949, were in the vicinity of $12,000.00. Our total purchases in 1949 of automotive parts were in the vicinity of $2,000,000.00.

As to whether any car dealer in our trade area offers replacement parts of the Moog line, for sale, I would not be in a position to know definitely whether the same dealers offered the Moog line or not, but they do offer items the same as Moog's perhaps by a different manufacturer (Part 2, Pages 339, 340). I would not know that any better than I would know whether or not they handle the Moog line. There might be some exceptions that we would not know about. So far as I know, no tire or oil company offers replacement parts of the Moog line for sale. Other than jobbers, no one else, to my knowledge, offers any replacement parts of the Moog line for sale.

Mills-Morris Company is a member of the Mid South buying group (Part 2, Page 340) and we have purchased the Moog line through that group.

Cross Examination.

Q. Mr. Meadows, name the automotive parts (?) that you distribute and sell.

A. Car manufacturers and car dealers.

At this point Commission's Exhibit 58A and "B", 59, and 60 were marked for identification.

THEODORE N. HAGGEL testified as a witness on behalf of the Commission.

Direct Examination.

My name is Theodore Norbert Haggel; I am President of Mid South Distributors, 1307 Sterick Building, Mem-

phis, Tennessee. I have been President about five years and am here under a subpoena.

Mid South Distributors is in the automotive replacement parts business. Approximately 75 manufacturers' lines are purchased by us (Part 2, Page 342).

Q. How many individual parts, sold as individual parts, Mr. Haggel, would that number, approximately?

A. That calls for a variable answer; perhaps in the neighborhood of 18 to 20 or 22. We purchase the products which the members of Mid South offer for sale from manufacturers who are supplying material towards the market that we are attempting to cover (Part 2, Page 343).

The general area that the members of Mid South offer their products for sale is from Savannah, Georgia, on the eastern coast as far as Corpus Christi on the west. That doesn't mean we are covering all of that area but merely means that we have members within that boundary that I have just described; but we certainly don't plan to cover 100% of that territory by any means. There are 17 members of Mid South Distributors. The number of individual stores that the individual members have would run, I would say, approximately 70 at this time, saying nothing about sub-jobbers that they might serve.

The names and locations of Mid South members are as follows:

Mills-Morris Company,	Memphis, Tennessee
Keith-Simpson Company,	Nashville, Tennessee
Fulton-Conway Company,	Louisville, Kentucky
Southern Automotive Supply Co.,	Chattanooga, Tennessee
A. S. Hatcher Company,	Macon, Georgia
The Motor Supply Company,	Savannah, Georgia
Tennessee Mill & Mine Supply Co.,	Knoxville, Tennessee
Motor Supply Company,	Meridian, Mississippi
Central Electric Company,	Hattiesburg, Mississippi
Borden-Acklen Company,	New Orleans, Louisiana
Crasford & Company,	Shreveport, Louisiana
Motor Supply Company,	Monroe, Louisiana
Corpus Christi Hardware Company,	Corpus Christi, Texas
Wadell-Connally Company,	Tyler, Texas
Voss-Hutton Company,	Little Rock, Arkansas
Williams Hardware Company,	Fort Smith, Arkansas.

All these members or companies mentioned are engaged in the resale of automotive parts. They would be termed jobbers of automotive parts (Part 2, Page 346).

Mid South Distributors was incorporated approximately in 1937. I am the President. Mr. K. P. Allen of Motor Supply Company, Meridian, Mississippi is Vice-President. Miss U. B. Bonden is Secretary and Treasurer. I do not own any stock in Mid South Distributors (Part 2, Page 347). There is no outstanding stock. Mid South is a co-operative. The directors of Mid South are the top management of each of the 17 members. In 1949 Mid South Distributors entered into a contract with Moog Industries (Part 2, Page 348). It contained the terms of purchase with members of Mid South Distributors. The contract provided for a cash discount. It provided for a volume discount. It provides for a volume rebate. Mid South as an organization and its members took advantage of all the offers of discount in the contract for the year 1949. The witness was asked if he had the records of those with him and answered that the Federal Trade Commission had most of those records, but that he had some copies of records. The total amount of purchases by members of Mid South Industries for 1949 was approximately $90,000.00 (Part 2, Page 349). The amount of discount earned for 1949 was approximately $9,000.00.

Referring to Moog Industries, Inc. as to the method of purchase, billing, shipment and remittance, the orders are mailed in the field by our member who, naturally, is the recipient of the merchandise. The order blank is mailed in triplicate, the original being sent to the manufacturer, the second copy comes to our office with instructions to bill Mid South in triplicate with Mid South receiving the original invoice, the participating member receiving the Number 2 invoice, and Mid South being responsible for financial handling of the account. As a general rule orders to Moog Industries do not originate from Mid South headquarters here in Memphis, Tennessee (Part 2, Page 350). To my knowledge Moog Industries has never shipped an order direct to Mid South in Memphis, Tennessee. The total amount of purchases of Mills-Morris Company from Moog Industries in 1949 is in the

vicinity of between $10,000.00 and $12,000.00 (Part 2, Page 351).

In 1949 there were three different rebate schedules applying to different lines offered by Moog Industries.

Q. Mr. Haggel, do you have an overall percentage, not particularly to any line, but the lines as a whole, overall percentage of rebates which was earned by Mid South in 1949?

A. If I had an overall, it would be strictly one of my own conclusion and my own calculation.

It would have nothing to do with our related connection with Moog and I would say in the vicinity of about 11%.

The witness was asked to refresh his memory from a document handed him by counsel for the Commission (Part 2, Page 352). Witness was told that he was being asked what were the total purchases from Moog Industries by Mills-Morris through Mid South. The witness answered that the figure that you have there is a gross figure. It takes into account no returns or vice versa when we break it down. It does not show our cash discounts, Federal Excise Tax, and many other things that come in there, so when I testify the way I do we break these figures down on both sides and it wouldn't be $2500.00 or $3,000.00 over what is presented there.

Q. What was the gross figure of Moog, Inc., from Mills-Morris in the year 1949?

A. I have previously testified that they were in the vicinity of $90,000 in 1949.

Q. Gross purchases of Mills-Morris?

A. No, I thought you said Mid-South.

Q. No, I am limiting it to Mid-South (Mills-Morris?)?

A. Limiting it to Mid-South (Mills-Morris?) from Moog Industries, Inc., I would say the gross purchases were within the vicinity I have previously testified to, $10,000 to $12,000. You have it—according to the records you have there, it shows up $19,000.

Trial Examiner Kolb: How do you account for the difference between $19,000 and $10,000 or $12,000?

The Witness: The difference between the $10,000 and the $19,000 is, as I have testified to there, was for some

summing up billing procedure as outlined there (Pages 353, 354).

The witness was shown a document marked Exhibits 58A and 58B and was asked to tell what the document was without regard to its contents. The witness answered that the document referred to was marked "Strictly Confidential" and that it was a "brainchild" of his own to the membership relative to confidential relaying of the information covered by the subject. The witness was asked if he signed that bulletin and answered that he didn't particularly sign it. It is under my signature by my secretary which was authorized. It is their bulletin. Commission's Exhibit No. 59 is a bulletin covering Moog coil action purchases, under date of April 20, 1950, and in it I discussed the possibility of our existing contract with the members (Part 2, Page 356).

Commission's Exhibit 60 is a letter relative to the subject of Moog Springs, under date of August 10, 1949, in which a change in policy took place, and which was made retroactive to July 1, of that year, and this was an announcement covering that situation (Part 2, Page 357).

Thereupon Commission's Exhibits 58-"A", "B", 59, and 60 were offered and received in evidence (Part 2, Page 358).

Cross Examination.

Q. Mr. Haggel, Mid South Distributors is now a respondent in a complaint similar to what Moog is under at the present time, is it not?

Counsel for the Commission objected to the question as immaterial and not covered by direct examination, and the objection was sustained.

The Federal Trade Commission has not offered us any promise of immunity or other consideration in respect to my testifying here on behalf of the Government.

The witness was asked if he expected to receive consideration in the matter in which he was a respondent as a result of his testimony here (Part 2, Page 359). Counsel for the Commission expressly denied that they had made a deal with the witness. The witness answered the question saying "I can't say that I expected any consideration.

I thought probably I might be the apple-cheek boy and thought that the Federal Trade Commission might try to grant me a certain amount of justice, but other than that, no.

The terms under which Mid South buys their Moog Industries products are very similar to those under which we buy from other manufacturers, comparably equal rebates, and so forth, and we buy from 75 manufacturers" (Part 2, Page 360).

DUNBAR ABSTON testified as a witness on behalf of the Commission, as follows:

Direct Examination.

My name is Dunbar Abston, business address 600 Monroe Avenue, Memphis, Tennessee.

I am an executive in the firm of Ozburn & Alston, who are in the business of wholesale automotive parts, supplies, and equipment. We offer for sale in the neighborhood of 300 general manufacturers' lines; I have made an accurate count of it. As to individual items that we buy and sell, that would run from 18,000 to 25,000. It varies (Part 2, Page 361). We purchase the products we offer for sale from several sources; largely from Ozburn, Crow & Yantis Company. That is a corporation engaged in the purchasing and distributing of automotive parts and supplies. I am Vice-President of that corporation. I think I have been an officer of that corporation since 1938. Other than from Ozburn, Crow & Yantis, we purchase products for re-sale from various sources (Part 2, Page 362). Occasionally we make emergency purchases from local distributors. I believe that is what they all do. Ozburn & Abston Company offers its products for sale in west Tennessee, southeast Missouri, central and eastern Arkansas, the north two-thirds of Mississippi, northwest Alabama and part of Louisiana. We operate 40 stores. They are located in the general area that I have just described. We travel salesmen, I think there are 64 of them and they cover the general trade area I have just described (Part 2, Page 363). We offer our goods through the usual auto-

motive channels—service stations, independent repair men, fleet owners, garages, car dealers, implement dealers, and tractor dealers. In an isolated case we offer our products for sale to other jobbers located in the area. We have quite a lot of competition in the sale of our products in our area. Our principal competition is from two sources —the jobbers or distributors who operate businesses— and one of our principal sources of competition is the car manufacturer who sells through the car dealers. We offer Moog products for sale. In 1949 we offered their front end parts and springs (Part 2, Page 364). The gross amount of purchases of Moog products by Osburn & Abston Company in 1949 was $52,000.00. We received the usual discounts, I believe; they are different on the two different products that they deliver. I do not have the segregated figures on purchases of those two different lines for 1949. I gave you the total but I don't know the amount of either line (Part 2, Page 365). The amount of rebate earned by Ozburn-Abston Company on its Moog purchases in 1949, as I recall it, on all of the parts was 19%. On springs and leafs I think it was 15%, or it may have been 10%. I have the papers with me but there seems to be a discrepancy. I looked at them before I got on the stand and on one it says 10% and the other 15%, and I think it was 15%, although I cannot be sure, although it can be verified. The witness was asked what were his gross purchases of all lines of automotive parts for 1949 (Part 2, Page 366). The witness answered that he could give the sales very exactly but he was not sure about the net purchases; that he would say they were a little less than $400,000.00 (The witness corrected this figure to $4,000,000.00, at Page 380).

Q. Mr. Abston, in 1948 did you purchase Moog's products according to the terms of a written contract?

A. I think it was a printed agreement; I think it is in our files, sir. I can't answer that honestly; I think we did, but I cannot be sure (Part 2, Page 367).

Q. Mr. Abston, do you recall who were the contracting parties under that agreement?

A. Well, I should think it would be a percentage account; Mr. Scates and probably Mr. Apple of the Moog Company.

Mr. Scates is Vice-President of Ozburn & Abston Company. To my knowledge no car dealer offers any replacement parts of the Moog lines for sale in our area in competition with our product.

Cross Examination.

We sold front end parts, leafs and springs (Part 2, Page 368) and I believe we sold them to car dealers, and one car dealer sells to the ones we sell. They sell in competition to us. We do sell the car dealer under these circumstances whenever those parts are unavailable to them from their ordinary sources. I wouldn't know the percentage of volume or our total sales made to car dealers of Moog products.

Q. Is it true, Mr. Abston, that the car dealers and car manufacturers, through car dealers, control the majority of the automotive parts industry?

This was objected to and the objection was sustained.

I have been in the automotive business since 1917, and have devoted all of my time to it since that time (Part 2, Page 369). I happen to be a farmer but that requires only a small portion of my time (Part 2, Page 369). I have operated competitively in the automotive parts business since 1917.

Q. Do you know what the competition situation is in automotive parts in the area in which you operate?

This was objected to by counsel for the Commission and objection sustained (Part 2, Pages 370, 371).

From my past thirty-four years' experience in automotive parts I know what the competition is, based upon my experience. From my knowledge of the competition situation I believe that there are two major competitors—jobbers like our own organization and car manufacturers who distribute their parts through car dealers (Part 2, Page 371).

Q. Would you say that your competition is very severe from the car manufacturer?

A. Of course we do have a pretty fair knowledge of our direct competitors, that is, the jobbers and distributors who function in the same way we do. I don't know ex-

actly what the distribution of parts, total distribution of parts is through the car manufacturers' channel, but I do know it is very great, and the competition is very keen.

Q. And by "very great" do you mean in relation to other jobbers in your area?

A. In relation to all, sir (Part 2, Page 372).

Re-Direct Examination.

To my knowledge I do not know that car dealers in our trade area offer blue Moog replacement parts for sale (Part 2, Page 373).

B. C. McKee testified as a witness for the Commission as follows:

Direct Examination.

My name is B. C. McKee and I am owner of McKee-Moog Spring Company, 699 Monroe Extended, Memphis, Tennessee. I am a jobber (Part 2, Page 373). I am here in response to a subpoena. I am engaged in automotive replacement parts. I offer for sale about 25 manufacturers' lines and we handle individually about 600 parts. We purchase our products from manufacturers. At times we purchase products for re-sale from other sources, but it would not be a substantial amount. We offer our products for sale mostly in Memphis, Tennessee, some in Arkansas, and Mississippi (Part 2, Page 374). I have just the one store. I travel two salesmen who cover the general area I have described. We offer our products to fleet accounts, independent garages, service stations, wheel alignment shops, and car dealers. We occasionally make sales to jobbers in our area. I definitely have competition in the sale of our products in our trade area. I compete with other jobbers and other automobile dealers.

The connection between McKee-Moog Company of Memphis, and Moog Industries of St. Louis is that I maintain warehouse stock for emergency pick up throughout this area for the jobber. Moog Industries, Inc., do not own any part of my business and have never owned any part of it.

The warehouse stock of parts that I maintain is owned by Moog Industries of St. Louis. I do not insure those parts. I purchased front end parts, coil springs, U-bolts, and steel from Moog Industries in 1949. They were purchased according to an agreement between Moog Industries, Inc., and my company. The witness was asked to relate the terms of that agreement as they particularly provide for cash discounts or rebates (Part 2, Page 376).

The witness stated that he did not have the agreement with him but that he purchased in accordance with the terms that they have; that they have a rebate in a certain volume contract and that it is listed in the terms of the contract. My total purchases from Moog in 1949 were approximately $36,000.00. As to the total amount of rebates earned on those purchases, I don't have that with me, but I would say somewhere between approximately $2,500.00 and $3,000.00. My gross purchases of all automotive parts for resale in 1949, were about $90,000.00. The car dealer definitely offers replacement parts of the Moog lines for sale. The ones that do so are those that cannot get the parts from manufacturers. It may be either the manufacturers' back order of a knuckle, or whatever it is, and they buy not only from Moog but will buy any kind of a replacement stock they can buy to put in their stock. The car dealers don't advertise it but lots of them have replacement parts of the Moog line. They purchase these Moog replacement parts from anybody. They offer them for sale when in rare cases they can't get the parts from the car factory. They will go out and buy replacement parts whether it is Moog's or anyone else whoever calls on them that has the merchandise in stock. I spent some years with the car dealers and I know. I do not know whether these car dealers purchase these parts from Moog Industries. I sell them all I can sell them and I don't know who else they buy from (Part 2, Page 378). I do not belong to any buying group. In my warehouse I warehouse a certain amount of Moog products for resale to jobbers in the area. Such sales to these jobbers are not included in our annual volume in computing my rebate as I don't bill such parts on my invoice.

Cross Examination.

The sales from the Moog Warehouse stock are made to jobbers. I just deliver them on Moog billing. I do not price them and I do not make sales. I have nothing to do with sales solicitation. It is merely an emergency set up for jobbers (Part 2, Page 379).

EUGENE H. SURLES testified as a witness on behalf of the Commission as follows:

Direct Examination.

My name is Eugene H. Surles. I am Vice-President of J. B. Cook Company, 278 Washington Avenue, Memphis, Tennessee. I have held that position since 1938 or 1939, and am here in response to a subpoena (Part 2, Page 381). We are engaged in the distribution of automobile parts, supplies, machine shop operators, and various major component parts like blocks and crank shafts. We offer for sale approximately 40 or 50 different manufacturers' lines. These entail approximately 25,000 individual items. We purchase these products from manufacturers. In cases of emergencies when we run out of something, we pick up from another jobber or truck dealer or car dealer or someone like that. We offer our products for sale in Tennessee, Mississippi, and part of Arkansas, and a little part of Missouri and Kentucky (Part 2, Page 382). We maintain a total of 17 stores. They are located in Memphis and Nashville, Tennessee; Little Rock, Arkansas; McGee, Arkansas; north Little Rock, Arkansas; Columbus, Mississippi; Dyersburg, Tennessee; Mayfield, Kentucky; Hopkinsville, Kentucky; Clarksville, Tennessee; McMinnville, Tennessee; Columbia, Tennessee; Murfreesboro, Tennessee; and East Nashville, Tennessee.

Out of this unit here in Memphis, we travel eight salesmen. We travel one salesman out of Dyersburg and one out of Columbus, Mississippi. As to whether this is the entire number of salesmen that we travel, I do not have these records. We have member stores such as Columbus, Mississippi, and Dyersburg, Tennessee. The salesmen who

work out of Memphis cover a radius of from 100 to 150 miles (Part 2, Page 383). We sell our products to the independent repair shops, service stations, fleet owners, car dealers and tractor and truck dealers. Occasionally we sometimes act as a distributor in selling parts to other jobbers in the area. We have competition in the sale of our products in our area. We compete with car dealers, the truck dealers, the tractor dealers, the chains, the other jobbers, the major oil companies, and several oil manufacturing and rubber manufacturing companies. We purchase products from Moog Industries of St. Louis and did so in 1949. In that year we purchased mainly coil action parts. We do not stock springs or spring leafs at the Memphis store. We purchase according to a contract with Moog in 1949 (Part 2, Page 384). That agreement provided for various discounts or rebates which could be earned by us on our purchases. In 1949, our purchases from Moog Industries from the Memphis store, which includes Dyersburg and Columbus, were about $5,300.00. As to the total amount of rebates which we earned in that year, I do not have those records with me, but I would estimate about $400.00 or something like that. Our gross purchases overall of automotive parts for the member stores in 1949, just as an estimate, would be around $300,000.00 or $400,000.00. I cannot tell you the gross amount of purchases of the entire J. B. Cook & Company from Moog Industries in 1949. I do not know.

Q. Mr. Surles, does any car dealer, to your knowledge, offer any replacement parts of the Moog line for sale?

A. Well, they offer parts comparable to Moog's. They might not be Moog's in some instances but picked up around from other companies (Part 2, Page 385).

To my knowledge no car dealers in our area purchase Moog lines from Moog Industries. I know of no car dealer or Oil Company who purchased any Moog lines and offered them for replacement parts for resale. I do not belong to any buying group. As to the gross purchases of the entire J. B. Cook Company, of automotive parts, in 1949, I don't have the records with me.

We have three major operations at Nashville, Memphis, and Little Rock. The Little Rock operation has three

branch stores under it; we have two under the Memphis set-up; and Nashville has nine under their set-up, and also the books. We have three separate bookkeepers and purchasing agents, and so forth.

There was no cross examination (Part 2, Page 386).

LOUIS POST testified as a witness on behalf of the Commission as follows:

Direct Examination.

My name is Louis Post. I am an executive of D & N Auto Parts Company, Inc., 420 Howard Street, Greenwood, Mississippi. I have been an executive for approximately twelve years and have been associated with the company since 1918 (Part 2, Page 387). I have been actively engaged in the automotive parts field since 1917 and 1918. We are in the business of wholesale distribution of automotive parts and equipment, and we offer for sale approximately 65 or 70 manufacturers' lines. We bill approximately 22,000 to 22,500 individual items. We purchase the products that we offer for sale from the manufacturers. In extreme cases of emergency we may make a pick-up purchase from another jobber or distributor or from the car manufacturer or car dealer (Part 2, Page 388).

The general area in which we operate is principally the north half of Mississippi. We operate and maintain six stores at Greenwood, Grenada, Tupelo, Clarksdale, Cleveland, and Indianola, all in Mississippi. We travel eight salesmen who cover the above general area. We offer our products to fleet owners, tractor and truck dealers, independent garages, and to some car dealers. We never act as a distributor of parts to other jobbers (Part 2, Page 389). We have plenty of competition with other jobbers in the trade area, national chain operators, and have more car dealer competition. I would say car manufacturing companies, through the car dealers would be the principal competitor in our trading area. We purchase products from Moog Industries, Inc., and purchased from them in 1949. In that year we purchased from them springs;

mainly leaves, tie bolts, and front end repair parts. We purchased from them according to a contract or an agreement. As to the terms of that agreement, regarding discounts and rebates which might have been offered, I cannot answer that intelligently because I don't have a copy of the contract with me, but it was based upon a rebate schedule pro rated to the various businesses (Part 2, Page 390). As to our total purchases from Moog Industries, in 1949, not having my figures with me I could not answer that question. As to the total discounts or rebates earned on those purchases, the answer is the same. I would be guessing.

To my knowledge a car dealer does not offer any replacement parts of the Moog line for sale, which the car dealer has purchased from Moog Industries (Part 2, Pages 391, 392). To my knowledge, no tire or oil company offers replacement parts of the Moog line for sale, which they have purchased from Moog Industries. We belong to a buying group and purchased Moog products in 1949, through that group. We have been associated with that group for the past twelve years. Its name is Cotton States, Inc., (Part 2, Page 392). It is located at Greenwood, Mississippi. I was the principal organizer of that group. I have been an executive of Cotton States, holding the position as President and have held that position twelve years. There are nine members of Cotton States, Inc., (Part 2, Page 393). These members operate 23 different stores. Their names are Greiner Auto Parts, New Orleans; Barnes Motor Supply, Baton Rouge; Hart Motor Supply, Columbia, Mississippi; Christenson Auto Supply, Laurel, Mississippi; Milton Auto Supply Company, Meridian, Mississippi; Davis Auto Supply Company, Mobile, Alabama; Taylor Auto Supply Company, Andalusia, Alabama; and our own firm. The individual members of Cotton States travel salesmen (Part 2, Page 394).

Cotton States, Inc., does not maintain or operate a warehouse. Members of Cotton States, Inc., purchase products from Moog Industries, Inc., and purchased products from them in 1949 (Part 2, Page 395). I would say that approximately twelve years ago, at the origin of Cotton States, it first entered into an agreement with Moog Industries.

I participated in the negotiations preceding the contract, which was entered into between Moog Industries and Cotton States, Inc. (Part 2, Page 396). As to who represented Moog Industries in those negotiations, I think, if I recall correctly, it was Mr. S. A. Moog and Mr. A. Apple.

A typical purchase transaction between one of our members and Moog Industries is as follows: Each one of our association's members has a Cotton States Purchase Order Form. He mails his order direct to the manufacturer, the source of supply, and the source of supply in turn invoices and sends Cotton States the original and a duplicate copy, and Cotton States remits for the purchase. The shipment is shipped direct from the manufacturer to the individual member.

Q. Mr. Post, trading as the D & N Auto Parts Company, do you carry a particular, or any particular line, manufacturers' line, after the group purchasing arrangement with that manufacturer has expired?

A. Yes, sir.

Q. Does that mean a difference to you in the purchasing price?

A. In some cases, yes; and in some cases, no (Part 2, Page 397).

Some automotive parts manufacturers offer cash discounts to Cotton States, Inc., for prompt payment of bills and we avail ourselves of that offer. The reason we do that is obvious, because it is a part of the profit structure (Part 2, Page 398). The taking of the cash discount by Cotton States does not materially affect its profit structure (Part 2, Page 399). As to the taking of cash discounts by D & N Auto Parts Company, they do materially affect its profit structure. Moog offers the 2% cash discount the same as other manufacturers. That cash discount relates to the cost of acquisition of goods from Moog Industries. This cost of acquisition of goods is important to us (Part 2, Page 400): You have got to be competitive in the field if you are going to stay in business, and your cost basis is one principal item that you must be competitive on (Part 2, Page 401). We take advantage of the cash discount and the annual volume discounts or rebates offered

by Moog Industries. I consider all these discounts important (Part 2, Page 401).

Cross Examination.

The 2% cash discount that we receive from Moog relates solely to purchases that we individually purchase as D & N Auto Parts Company. We purchase from approximately 75 manufacturers and Moog is one of them. Not having my records with me I cannot answer the question intelligently as to what percentage of that cash discount for prompt payment of bills that we take from Moog to the cash discounts that we take from the 75 manufacturers. We do not in all cases give a 2% tenth prox discount to our customers. We do not in all cases give it to them if they pay promptly. We do not in all cases get this discount from the manufacturer (Part 2, Page 402). In the majority of cases we do get it from the manufacturer. As to the cash discount being a general practice in American industry, it varies from one, to two, to 5%. In the automotive supply business, that is a percentage given for the prompt payment of bills, and, to my knowledge, is a general practice in American industry (Part 2, Page 403).

October 8, 1951, at Washington, D. C.

Commission's Exhibits 61 to 69, inclusive, were marked for identification.

M. C. STEELE testified on behalf of the Commission as follows:

Direct Examination.

My name is M. C. Steele and I am an accountant with the Federal Trade Commission since 1929 (Part 2, Page 407), and since that time I have been engaged in personally examining records and accounts and preparing data to be used in hearings before examiners of the Federal Trade Commission.

As to my educational background, in accounting I was two years at the University of Idaho, School of Business

Administration, and am a graduate of the Ben Franklin University, Washington, D. C. I am familiar with the record of proceedings in Docket No. 5723, in re Moog Industries, Inc. I examined the ledgers, accounts receivable, the invoices, summary of sales, work sheets prepared by the accounting department of Moog Industries, Inc., contracts with various customers, and exhibits introduced in the record by Commission's witnesses. Those exhibits were introduced by Mr. Goetz, who was an officer of respondent (Part 2, Page 408), and the contracts which I mention and which I examined were contracts between Moog and their customers. Mr. Goetz, the Treasurer of the Respondent, made these papers available to me. He was the person who actually presented the documents to me prior to my examination, and I examined all these documents at the office of Moog Industries, Inc.

I, personally, prepared Commission's Exhibits Numbers 61 through 69. I checked them personally for errors and also had a check made by one of my assistants. Prior to the preparation of these exhibits, I, personally, examined the records of Moog Industries, Inc. These exhibits, 61 through 69 are based upon my personal examination of Moog Industries' records (Part 2, Page 409).

Commission's Exhibit No. 61, which is headed "Coil action sales and rebates to jobbers in Memphis, Tennessee," shows the sales to all jobbers located in Memphis, Tennessee, during each of the years 1947, 1948, and 1949. It shows the name of the jobber, the contract year, when the contracts were ended; the credit memorandum number and its date; the net sales which represent gross sales after deduction of returns and allowances; the cash discount which the company was entitled to receive; the excise tax of 5% which was included in the sales price; the net amount upon which the rebate was figured which represented the net sales after deducting the allowable cash discount and the amount of excise tax. It includes the amount and the percent of rebate and net payment receivable by Moog Industries, Inc., together with the percent of the net payment received of the net rebatable amount (Part 2, Page 410).

Commission's Exhibit 61 is limited to coil action sales and rebates of Moog Industries to jobbers in Memphis.

Tennessee. With reference to the column headed "Jobber", I examined Moog Industries' statistical summary to determine whom they sold to in Memphis, during the year, and these records disclosed the jobbers indicated on this chart to be the only jobbers receiving shipments of coil action parts in 1947, 1948, and 1949. As to the second column, "Contract Year" the date 3-31-47, opposite the entry J. B. Cook Auto & Machine Company, represents the end of the contract year. In other words, in that particular case the contract year ran from April 1, 1946 to March 31, 1947 (Part 2, Page 411). As to the column headed "Credit Memorandum" with sub-headings "Number" and "Date", the entry opposite J. B. Cook Auto & Machine Company for 1947, which is Number 776 and dated 4-28-47, indicates that following the end of each contract year the company issued a credit memorandum for the amount of the rebate to which the customer was entitled for that preceding contract year, and represents the credit memorandum number and the date of such credit memorandum.

In 1947, two of the entries, Ozburn-Abston and Mills-Morris Company, the entry reading "Check" and "1-14-48," indicate that in these two instances, instead of issuing a credit memorandum to the customer, Moog Industries issued a check in payment of the amount of the rebate. The same explanation of these items that I gave for 1947 also applies to 1948 and 1949.

Moving to the column headed "Net Sales" that represents the gross billings less returns and allowances such as for obsolete material or defective material. The figure of $1,884.99 opposite J. B. Cook Auto & Machine Company for 1947 represents the figure before any discount had been allowed (Part 2, Page 412).

The cash discounts column, headed "2%", represents 2% of the net sales and is the amount to which the customer is entitled as a cash discount and was deducted by the company in computing the rebatable amount. The figures $37.20 opposite those figures were actually on the Moog Industries' work sheet for the calculation of the amount of rebate. That same statement applies to all the entries appearing on this chart under these discounts.

The excise tax represents the Federal Tax imposed on automobile parts and represents 5% of the net sales less

the 2% cash discount and was included on the work sheets of Moog Industries in calculating the amount of the rebate. The figures appearing in the excise tax column opposite all the entries for 1947, 1948, and 1949 were actually taken from the records of Moog Industries, Inc. (Part 2, Page 413).

The figures in the column headed "Net Amount" represents the net sales less the cash discount, less the amount of excise tax, and is the base upon which the rebate is computed. These figures appearing in that column were taken from the records of Moog Industries, Inc., including those in the Commission's exhibits in the record in this case, brought in by Mr. Goetz.

The column headed "Rebate" represents the amount of the rebate which the company paid or credited the customer based on its volume from the preceding contract year. The percentage in the case of J. B. Cook was 10% of the net amount in the preceding column (Part 2, Page 414). The percentage column shows different percentages and results from the varying annual volumes upon which the rebate was computed. The entry opposite J. B. Cook Auto & Machine Company for 1947, in the rebate column, is $175.49, and that was the figure shown on the credit memorandum Number 776, dated 4-28-47.

Referring to the entries for 1947 opposite the Ozburn-Abston Company and to the $4,199.25 and 19% shown in the rebate column, those figures were obtained from the exhibit in the record brought in by Mr. Goetz, and are included in Commission's Exhibit 23-Z-15, and that is true of all the entries opposite the Ozburn-Abston Company in the rebate column for 1947, 1948, and 1949 in similar exhibits, but not the same number. These exhibits are already part of this record and were introduced through Mr. Goetz (Part 2, Page 415).

The "Net Payment Received" column represents the net sales less cash discount, less the excise tax, and less the amount of the rebate for each customer. These figures were obtained from the work sheets of Moog Industries or from the exhibits brought into the record by Mr. Goetz. And the exhibits that are in the record refer to Ozburn-Abston Company and Mills-Morris Company for 1947, 1948 and 1949.

The last column "Percentage of Net Amount" represents the percentage of the net payment received of the net amount upon which the rebate was computed (Part 2, Page 416). The varying percentages, as shown in this column vary in inverse order with the percentage of rebates received by each of these customers for each year; or, in other words, the greater the percentage of rebate, the lesser percentage is disclosed in the percentage of net amount column (Part 2, Page 417).

Commission's Exhibit 62 represents the summary of the coil action sales and rebates to jobbers in New Orleans, Louisiana, by Moog Industries during each of the years 1947, 1948, and 1949. It represents all the various customers as far as shipments were concerned to New Orleans, Louisiana, as I found them on Moog Industries records. The same explanation for the various columns as they appear on this exhibit would be explained similarly, as I have done on Commission's Exhibit 61. In this exhibit the material is identical in the same column and came from the same sources, with the exception of the amount opposite Auto Chassis & Spring Company for the year 1949. Their purchases did not amount to enough to entitle them to a rebate, so the company made no computation of the amount of the cash discount or the excise tax applicable, so that the amount shown on these columns opposite Auto Chassis & Spring Company were computed by me in order that the net amount would be on a comparable basis with what the company had computed the rebatable amount to be for the other customers listed at this location (Part 2, Pages 418, 419). In computing such amounts, I follow the regular procedure that Moog uses in computing rebatable amounts and rebates upon purchases which were entitled to rebates. The figures appearing in "Cash Discount" column, opposite Auto Chassis & Spring Company, for 1949, namely $6.37, and $15.59 in the excise tax column, are figures computed by me. Explaining the footnote appearing on Commission's Exhibit 62 in the computation of the rebate to Auto Shock Absorber Sales, in 1949, the company did not follow its usual method and computed the amount of the rebate on the net sales before deducting any cash discount or excise tax (Part 2, Page 419), referring to the Auto Shock Absorber Sales Account

for 1949, the figures that appear opposite that entry are figures and calculations made by Moog Industries.

Referring to the entries in the Rebate Column in Commission's Exhibit 62 opposite the Greiner Auto Parts Company for 1948 and 1949, the basis for these figures were taken from the exhibits introduced in the record through Mr. Goetz and represented an allocation of the rebate to the members of Cotton States, Inc. This allocation was made by Moog Industries in preparing the work sheets which are in the record in this instance as Commission's Exhibits 23 and 22.

Commission's Exhibit 63 represents a summary of the coil action sales and rebates to jobbers in New Brunswick, New Jersey, by Moog Industries during each of the years 1947, 1948, and 1949 (Part 2, Page 420). It shows the jobbers to whom shipments were made by them in those years in New Brunswick, New Jersey, as disclosed from my examination of the sales statistical summary furnished by respondent. The entries on Exhibit 63 are identical with entries under the column on Commission's Exhibit 61, with one exception. In 1947, the amount opposite Clinton Square Auto Parts Corporation was on a different basis. In that year Moog allowed Metropolitan Automotive Wholesalers, of which Clinton Square Auto Parts Corporation is a member, to deduct 10% from its monthly remittance to Moog. The deduction of 10% was in lieu of an annual volume rebate and effect to it has been given in the figures in this exhibit (Part 2, Page 421). However, in 1947, 1948, and 1949, this particular account, Clinton Square was similar to any other account which appears on this chart. In the credit memorandum column opposite the entry in 1947 for Clinton Square, the capital letters "MVR" stand for "Monthly Volume Rebate". The footnote appearing on Commission's Exhibit 63 shows that the amount of rebate was computed before deducting any cash discount or excise tax, which was different than the usual procedure of Moog Industries. This procedure was indicated on their records when I examined them.

Commission's Exhibit 64 represents a summary of coil action sales and rebates to Jobbers in Newark, New Jersey, by Moog during each of the years 1947, 1948, and 1949

(Part 2, Page 422). It represents all the jobber customers receiving shipments in Newark for 1947, 1948, and 1949, as shown by the sales summary cards furnished to me by respondent, and the columns as appearing on this exhibit correspond to the columns as indicated on Commission's Exhibit 61, and the same explanations for the columns and the factual material disclosed is as applicable to this exhibit as was given for Commission's Exhibit 61, with the exception that I have stated in connection with Commission's Exhibit 63. There is an exception in Commission's Exhibit 64 in that the amount opposite American Motor Specialties Company and the amount for Clinton Square Auto Parts Corporation for 1947 were handled on a different basis by Moog than the other computations of the annual volume rebate (Part 2, Page 423). Moog allowed the Metropolitan Automotive Wholesalers, of which group Motor Specialties Company and Clinton Square are members, to deduct 10% of the monthly remittance in payment for purchases, and effect to that deduction has been given in the calculations of this exhibit. The footnote appearing on Commission's Exhibit 64 shows the 10% rebate given to the American Motor Specialties Company and Clinton Square on their purchases during 1947 was computed on net sales before deducting any cash discount or excise tax. That was applicable only to the entries opposite those two companies for the year 1947.

Commission's Exhibit 65 represents the summary of the coil action sales and rebates to jobbers in Des Moines, Iowa by Moog during each of the years 1947, 1948 and 1949 (Part 2, Page 424). The columns of this exhibit are identical to those in Commission's Exhibit 61, and the same explanation as to each applies with two exceptions. The first exception is in 1947, opposite City Automotive Supply Company. This customer did not purchase sufficient coil action parts in 1947 to entitle him to an annual volume rebate, so that no computation was made by the company and these computations were made by me in order to put the net amount on the same comparable basis as the net amount computed by the company for other customers at this location. This computation was made in a similar manner as would have been made by Moog had the cus-

tomer been eligible for rebate. The explanation for footnote 1, appearing on Commission's Exhibit No. 65, is the same as the explanation appearing for the footnote on Commission's Exhibit 62 (Part 2, Pages 425, 426).

Commission's Exhibit 66 is a summary of the coil action sales and rebates to jobbers in Denver, Colorado by Moog during each of the years 1947, 1948, and 1949, and these columns are identical with the column appearing on Commission's Exhibit 61, and the same explanations for those columns and the figures thereunder apply to the explanation and the figures in the identical column on Commission's Exhibit 61 with certain exceptions similar to the explanation on Commission's Exhibit 62, and the explanation for the column on Commission's Exhibit 61 applies similarly to Commission's Exhibit 66 (Part 2, Page 426).

Commission's Exhibit 67 represents a summary of the coil action sales and rebates to jobbers in Birmingham, Alabama, by Moog during each of the years, 1947, 1948, and 1949, and the columns appearing in this exhibit are identical with the columns appearing on Commission's Exhibit 61 with the same explanation for the corresponding columns on Commission's Exhibit 61, with one exception, that is that opposite the name Ensley Auto Parts Company for 1949, for cash discount and excise tax, that amount was computed by me as the company made no computation since the customer was not entitled to an annual volume rebate for that year (Part 2, Page 427).

Commission's Exhibit 68 represents a summary of coil action sales and rebates to jobbers in Brooklyn, New York, during each of the years 1947, 1948, and 1949, by Moog; and the headings of the column on this exhibit are identical to those in Commission's Exhibit 61, and the explanations for those columns are the same as for Commission's Exhibit 61 with one exception: That opposite the name Leonard Auto Supply Company during 1949, the cash discount and excise tax and net amount was computed by me since the company's record did not include such computation as this customer was not entitled to a rebate during the year 1949.

Under the year 1947, in the jobber column there are two entries for the K. and G. Auto Parts Company and the A.

Jacoby & Sons, Inc. accounts (Part 2, Page 428). Both of these companies became members of Metropolitan Automotive Wholesalers, Inc., as of December 1, 1947. Their regular contract year expired in the case of K. & G. on June 30, 1947, and in the case of A. Jacoby on April 30, 1947. Accordingly, to make the contract year coincide with that of the group purchaser, their purchases during the period between the end of their regular year and the period when they became members of that group were computed for the purpose of calculating the annual volume rebate due them for that period. Consequently, the account shows the amount of annual volume rebate due for a full contract year and the amount of annual volume rebate due for the portion of the contract year between their regular, annual volume rebate and the contract year beginning when they became members of the group. These computations were taken from the records of Moog Industries.

Commission's Exhibit Number 69 represents a summary by discount brackets of the number of customers and the average annual coil action purchases by these customers during each of the years 1947, 1948 and 1949, from Moog Industries (Part 2, Pages 429, 430). These were taken from exhibits introduced in this record through Mr. Goetz, Comptroller of Moog Industries. As to this exhibit, column by column, what the figures mean, and the basis for the figures, I explain as follows: On the net purchases this follows the discount brackets set up by Moog Industries in its contracts with its coil action customers. Under "Rebate" is the percent of rebate applicable to each of those discount brackets, and under each of the years appears the number of the customer and the average annual purchases opposite each of the discount brackets and the percentage is the number of customers which received that percentage of rebate on the net purchases in that discount bracket; and it also shows the average annual purchases of those customers in that discount bracket (Part 2, Page 430). This applies to each of the years 1947, 1948, and 1949. The figure "369" appearing in the number of customers column for 1947, opposite the entry "$1,000.00 to $4,999.99" means that 369 of Moog's coil action customers

purchased between $1,000.00 and $4,999.00 during that contract year.

Referring to the entry in the "Net Purchases" column, "27,500 and over" and the rebate of 19%, and in 1947, to the column "Number of Customers" appearing on Commission's Exhibit 69 as "7", there were two group customers included in the 7 figure for 1947, and these two group customers had 20 members purchasing from Moog Industries during that contract year.

Referring to the figure "11" in the "Number of Customers" column in 1948, opposite the entry $27,500.00 showing the figure "11", there were included in this figure 4 group buyers which had a total of 44 members purchasing from Moog Industries during that contract year (Part 2, Page 431).

Referring to the figure "5" in the "Number of Customers" column for 1949, opposite the entry $27,500.00, on Commission's Exhibit 69, there were four groups considered as single purchasers, which included 65 members in those four groups purchasing from Moog Industries during that contract year.

At this point, Commission's Exhibits 61 through 69, inclusive, were offered in evidence, but admission was deferred by the Examiner until close of cross examination.

Cross Examination.

Q. Mr. Steele, in the expression "Percentage Of Net Payment Received of Net Rebatable Amount" I would like to have an explanation of what you mean by that statement, referring to Column "12." of Exhibit 61 (Part 2, Page 432).

A. If you are numbering the columns, that would be the percentage of Column "11" of Column "8".

Q. Oh, you disregard that column showing the credit memorandum numbers and checks, if you number the columns that way. In other words, there are two columns under "Credit Memorandum". You have two columns and one gives the number of the credit memorandum and the word "check" is in that column, and the other is the date column.

Commission's Counsel: That would be treated as one column?

The Witness: No; two columns.

On Exhibit 61 there is a column which has a group of names entitled "Jobber"; another column, Number 2, entitled "Contract Year"; another column, Number 3, with certain numbers and words; and Column Number 4, with "Dates". Column 5 is "Net Sales"; Column 6 is "Cash Discounts"; 7 is "Excise Tax"; 8 is the "Net Amount"; Column 9 is the "Rebate Amount"; Number 10 is the "Percentage"; Number 11 is the "Net Payment Received"; and Number 12 "Percentage Net Amount". Referring to column 12, "Percentage of Net Amount Received Of Net Rebatable Amount" that is the percentage of Column 11 of the Net Amount, which is Column 8 (Part 2, Page 433). That figure is not actually money received by the company, but is a computation either by the company, as I explained, or in certain cases by myself, of the net payments which were due on those sales.

Q. In other words, "Net Payment Received" that column could be restated, to be more accurate, as "Net Payments Which Would Have Been Received According To The Computations Made By Mr. Goetz and the computations Made By Yourself," synthesized?

A. Well, Mr. Goetz's was a complicated procedure—probably a little more—. Another explanation, would be the "Net Amount Receivable".

As to Column 6, "Cash Discount", whether that would be more correct as "Cash Discounts Receivable" under certain circumstances, the company used "Cash Discounts", so I followed their same procedure in that in computing the net amount upon which the rebate was computed. That cash discount is 2% of the net sales (Part 2, Page 434); that is, if paid by the 10th of the month following billing. As to whether that is a credit device, yes, it would be a credit. In other words, the company would receive credit on its account, or usually, actually, they would deduct the 2% in their remittance. No, that is not considered a marketing device.

In regard to Commission's Exhibit 61, I would give the same answers to the same question as to Exhibits 62 to 68, inclusive (Part 2, Page 435). These exhibits refer to computations of the sales of coil action parts by Moog Industries to jobbers in the respective Cities of Memphis, New Orleans, Brooklyn, Newark, Des Moines, Denver, and Birmingham. As to whether I made any study of the total coil action parts sales in those cities, I referred to sales statistical summaries prepared by the company in the usual course of business, in which were all sales or shipments to these particular cities and my exhibits are based on those sales cards. I made no study of the coil action parts market in those particular cities. I have no opinion as to what percentage of these sales of coil action parts by Moog was to the total sales of coil action parts in those cities. I do not know of any such study. To my knowledge, the Federal Trade Commission has made no such study (Part 2, Page 436). In preparation of this material, I spent approximately one week at the general office of Moog Industries.

I am an accountant by profession. My duties with the Federal Trade Commission since 1929 have been primarily on the accounting questions. Under the Federal Trade Commission I have also been employed in statistical research on marketing as such in petroleum, phosphate rock, and bread—the wholesale breadmaking industry. I had charge of marketing research in those studies, together with a corps of assistants (Part 2, Page 437). I have never done any marketing studies in private industry. I do not have a degree in business administration from the University of Idaho. My degree from Benjamin Franklin University was in accounting. I have done no graduate work in statistics. In my duties, as to whether I employed a series of statistics in my work, it depends upon my duties as they vary depending upon the particular type of study that I am making. I have done no work in the preparation of correlation charts. I know in a general way what a correlation chart is. I have done no work in qualitative analysis in mathematics or in quantitative analysis (Part 2, Page 438). I have never taken a course in calculus (Part 2, Page 439).

At this point, counsel for Respondent renewed the basic jurisdictional objections made to all the other exhibits that have been introduced in the case by the Commission (Part 2, Page 439), which was overruled on Page 440.

Thereupon Commission's exhibits, numbers 61 to 69, inclusive, were received in evidence (Part 2, Page 442).

March 4, 1952, at Washington, D. C.

Thereupon the following documents were marked as Commission's Exhibits numbers 70 through 79:

Commission's Exhibit 70A and B, marked for identification, a two-page tabulation entitled:

"Commissions and Bonuses paid to Mid-South Distributors, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification 71-A, B, and C, a three-page tabulation entitled:

"Commissions and Bonuses paid to Ozburn, Crow & Yantis Company on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked for Commission's Exhibit 72, for identification, a one-page document entitled (Part 2, Page 446):

"Commissions and Bonuses paid to Cotton States, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification number 73, a one-page document entitled:

"Commissions and Bonuses paid to Ark-La-Tex Warehouse Distributors, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification number 74, a one-page document entitled:

"Commissions and Bonuses paid to Automotive Southwest, Inc., on sales to its members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification number 75, a one-page document entitled:

"Bonuses paid to Automotive Parts Distributors, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification number 76, a one-page document entitled:

"Bonuses paid to Southwestern Warehouse Distributors on sales to its Members during the years ending June 30, 1949, and December 31, 1950" (Part 2, Page 447).

As Commission's Exhibit for identification number 77, a one-page document entitled:

"Bonuses paid to Warehouse Distributors, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And Commission's Exhibit for identification number 78, a one-page document entitled:

"Bonuses paid on sales to certain customers owning multiple stores during the years ending June 30, 1949, and 1950."

On Commission's Exhibit for identification 78, it applies during the years ending June 30, 1949, and 1950.

Marked as Commission's Exhibit for identification number 79-A, B, C, D, E, F, and G, a seven-page document entitled:

"Comparison of Sales and Commission and Bonus to Customers in Specified Localities during year ending June 30, 1949, and Fiscal Years ending during 1950" (Part 2, Page 448).

SETH M. MACDONALD testified as a witness on behalf of the Commission as follows:

Direct Examination.

I am employed as an accountant by the Federal Trade Commission and have been with them since 1935, except for the duration of the War. My duties are to conduct and supervise investigations and compilation of data. That data is often summarized in documents similar to the ones which have been marked for identification (Part 2, Page 449).

As to my educational background in accounting, I am self taught, and also at Syracuse Extension University and International Accounting Society.

In the preparation of Commission's Exhibits 70-A through 79-G, I examined the ledger accounts of Moog Industries at the physical location of those records.

As to Exhibit 70-A and B, I gathered the information appearing in Columns 1, 2, and 3 from Accounts Receivable Ledger Sheets in the office of Moog Industries. Those cards represent sales from Moog to various buyers. As to how I arrived at the amount appearing in Column 4 of this exhibit, the total of $3,884.69 was determined from data contained in Commission's Exhibits 21-Z-11 and 21-Z-12, which were compilations and computations made by Respondent (Part 2, Pages 450, 451).

The amounts in Column 4 are distributed on the ratio by $3,884.69 divided by $83,452.02, which was 4.65%., the basis of the various amounts in Column 3. The figures in Column 5 of this exhibit were arrived at by dividing Column 4 amounts by Column 3 amounts.

Data from Column 6 is assembled from Accounts Receivable Ledger Cards.

The total of Column 7, $9,978.71, was taken from Respondent's credit memorandum 8248S, dated January 15, 1951, and the amounts in Column 7 are distributed on the ratio that $9,978.71 divided by $66,719.77 is to the various item amounts in Column 6.

With reference to Commission's Exhibit 71-A, B, and C, the information in Columns 1, 2, and 3 was obtained from

Accounts Receivable Ledger Cards in the office of Respondent (Part 2, Pages 451, 452).

Q. Now, would you explain to us Columns 4 and 5 and how the figures appearing in those columns were arrived at?

A. The total of Column 4, $12,936.90.

That figure appears on Commission's Exhibit 71-C. It was determined from data contained in Commission's Exhibit 56-A, B, C, and D, which is a compilation of data of the respondent (Part 2, Page 452).

I, personally, examined Commission's Exhibits A, B, C, and D of Number 56, in determining the amount of $12,936.90 as it appears on Commission's Exhibit 71-C. Column 5 of that exhibit is the percentage arrived at by dividing the amounts in Column 4 by the amounts of Column 3. The amounts in Column 6 of this exhibit were assembled and compiled from Accounts Receivable Ledger Cards in Respondent's office.

The total of Column 7 is the amount of merchandise bonus allowed Ozburn, Crow & Yantis Company during the year 1950 as determined from examination of Cash Receipts records, memorandums as spelled out in footnote 2 on Commission's Exhibit 71-C (Part 2, Page 453).

Column 8 was arrived at by dividing the amounts in Column 7 by the amounts in Column 6. The percent figure "8" appearing in Column 5 of this record was arrived at by the dividing of amounts in Column 4 by the amounts in Column 3. I mean dividing the total amounts $12,936.90 by the amount in Column 3 of $161,711.19 arriving at the 8%. As to how the amounts were distributed in Column 4, they were arrived at by applying that 8% to the various items and amounts in Column 3 to determine the amounts to go in Column 4. As to how I arrived at the figure of 14.99% of column 8 of Commission's Exhibit 71-A, B, and C, I did that by dividing $19,627.65, total merchandise bonus allowed during the year 1950, by $130,914.92 (Part 2, Page 454).

I arrived at the figures appearing in Column 7 of this exhibit by applying the 14.99% to each of the amounts in Column 6.

Referring to Commission's Exhibit 72, I gathered the information appearing in Columns 1, 2, and 3 from Accounts Receivable Ledger Cards of Moog Industries. As to how the figures in Columns 4 and 5 were arrived at during the year 1948, it was determined from data contained in Commission's Exhibit 56A, B, C, and D that the rate of warehousing redistributing was 5% of net sales. For the first six months of 1949, it was determined from data contained in Commission's Exhibit 20-Q that warehousing distribution was allowed Cotton States at the rate of 5% net sales after deducting 2% cash discount and 5% Federal excise tax (Part 2, Page 455). The amounts in Column 4 for each of the members listed in Column One was determined by dividing the amounts in Column 3 between the last six months of 1948, and the first six months of 1949 and applying the rates previously described to those amounts and adding them, to arrive at the amounts in Column 4, after having first determined that the amount of $1,629.42 was the correct amount of warehousing redistributing commission allowed Cotton States for the year ending June 30, 1949. The fact that the warehousing redistributing commission allowed to Cotton States on sales to its members during the year ending June 30, 1949 on the different bases, accounts for the fact that the percentages in Column 5 vary somewhat because of the weight. If the purchase were heavy in the last six months of 1948, the rate would approach 5%; if they were heavy in the first six months of 1949, they would approach approximately 4.65%.

The data for Column 6 was obtained from Accounts Receivable Ledger Cards (Part 2, Page 456).

The data in Column 7, $4,605.83, merchandise bonus allowed during the year 1950, was obtained from examination of monthly remittances and data submitted on Respondent's credit memo 8246-S, dated January 12, 1951. This data is shown in foot note 3 of Commission's Exhibit 72.

The data in Column 7, opposite each of the companies listed in Column one, was spread on the basis of 14% of each of the amounts shown in Column 6.

The 14% shown in Column 8 is the result of dividing items in Column 7 by items in Column 6, totalled first, and then spreading over the various items listed in Column One. The 14% appearing in Column 8 was arrived at by dividing $4,605.83 by $32,898.81. For example, as to the second item on Commission's Exhibit 72 in Column 6, opposite Alabama Auto Parts Co., $417.52, the 14% then applied to that amount in arriving at $58.45 as it appears in Column 7 (Part 2, Page 457).

Referring to Commission's Exhibit 73, the data in Columns One, two, three and four are compiled on a symbol from Accounts Receivable Ledger Cards of Moog Industries. The data in Columns 3 and 4 represent net sales.

Column 3 is net sales of leaf springs during the year ending June 30, 1949.

Column 4 is the net sales of leaf springs, coil springs, and chassis parts during the calendar year 1950.

Column 5 is the amount of merchandise bonus allowed during the year 1950 in the amount of $1,940.66, and was obtained from Respondent's credit memorandum 8249-S. That amount was divided by $16,172.20, the amount of net sales of those items during 1950, producing a merchandise bonus rate of 12% (Part 2, Page 458). This 12% was applied to each of the amounts of Column 4 to arrive at each of the amounts in Column 5, and the amounts in Column 6 are arrived at by dividing the amounts in Column 5 by Column 4.

Column 7, headed "Warehousing and Redistributing Commissions": This data was obtained from an examination of Ledger Cards shown in Respondent's credit memo 8212-S, dated December 30, 1950, and contained a credit of $43.69 for warehousing and redistributing commission on leaf springs and coil springs in the amount of $43.69, on sales made by Tyler Service Parts Company to one of its customers, on which he was entitled to a 10% warehousing redistributing commission for services rendered.

The items in Column 8 are the sum of items in Columns 5 and 7, and the percentages in Column 9 are the amounts in Column 8 divided by the amounts in Column 4.

The entries appearing in Columns 4, 5, 6, 7, 8, and 9 apply to all transactions pertaining to leaf springs, coil

springs and chassis parts between these various customers and Moog during the calendar year 1950. With reference to foot note 2 of this exhibit, the credit memorandum, $43.69 was directed to the member, Tyler Parts Service Company, Tyler, Texas, with no mention of the group Ark-La-Tex (Part 2, Pages 459, 460).

With reference to Commission's Exhibit 74, I gathered the information in Columns 1, 2, 3, and 4 from ledger cards in the office of Moog Industries.

Column 3 contains data on sales of leaf springs to members of Automotive Southwest, Inc. during the year ending June 30, 1949.

The data in Column 4 shows the net sales of leaf springs, coil springs, and chassis parts to the members of Automotive Southwest, Inc., in the year 1950.

The total of $4,640.22, merchandise bonus, shown as a total of Column 5, was obtained from Respondent's credit memo 8261-S, dated January, 1951. The amounts above that in Column 5 were distributed on the ratio that it is to $34,447.63, total net sales (Part 2, Page 460).

The amounts in Column 6 are determined by dividing the amounts in Column 5 by the amounts in Column 4. In the case of this group, three of its members during the course of 1950 were allowed $516.92, warehousing and redistributing commission, as shown by the credit memos and foot notes 2, 3, and 4 of this exhibit.

The amounts in Column 8 are the total of Columns 5 and 7 amounts, and the percentages in Column 9 are determined by dividing the amounts in Column 8 by the amounts in Column 4. The fact that certain of these group members received warehousing and redistributing commissions accounts for the varying percentages as they appear in Column 9.

With reference to foot note 2 of this exhibit, the letter "S" indicates leaf springs; "C. S." indicates coil springs; "C.P." chassis parts.

With reference to Exhibits 70A through 74, the columns headed "Net Sales" mean gross sales less returns and allowances (Part 2, Pages 461, 462), and that is a constant definition of net sales throughout these exhibits.

Referring to Commission's Exhibit 75, the data in Columns 1, 2, 3, and 4, were compiled and assembled from Accounts Receivable Ledger Cards in Respondent's office.

Column 3 represents net sales of leaf springs only during the year ending June 30, 1949.

Column 4 represents net sales of leaf springs, coil springs, and chassis parts during the calendar year 1950. In both instances, net sales are gross sales less returns and allowances.

The total of Column 5, $4,383.71, represents merchandise bonus allowed Automotive Parts Distributors, Inc., as shown by respondent's credit memo Number 8254-S, dated January 17, 1951. The distribution of the amount in Column 5 was arrived at by dividing $4,383.71 by $31,312.23, a total of Column 4, producing a percentage of 14%, which, when applied to each of the items in Column 4, produces each of the items in Column 5 (Part 2, Pages 462, 463).

Column 6 is the 14%.

With reference to Commission's Exhibits 76 and 77, with the exception that Exhibit 76 applies to Southwestern Warehouse Distributors, and Number 77 applies to Warehouse Distributors, Inc., and with the exception for the difference in credit memorandums as they appear in footnote 2 on each exhibit, my explanations are the same for the columns on those exhibits as they were for the columns and information appearing on Commission's Exhibit 75.

With reference to Commission's Exhibit Number 78: In Column 1 are the names of the owners, except in the case where the name is indented. That is reported to be owned by the company immediately preceding it. The names are different but they are under sole ownership, so it was reported (Part 2, Page 463).

Column 2 is the location of the various stores.

Column 3 is constant; the year ending June 30, 1949, was selected for everybody in this examination.

Column 4 is the compilation of net sales of leaf springs only for the year ending June 30, 1949, for each of the companies in the various localities listed in Columns 1 and 2.

Column 5 applies to the contract year ending date.

Column 6 are net sales determined from an examination of Accounts Receivable Ledger Cards showing sales of leaf

springs, coil springs and chassis parts to the various customers at the various localities shown in Columns 1 and 2.

Column 7 indicates the credit memo number on which the merchandise bonus was credited for the year ending date as shown in Column 5.

Column 8, being each of the main customers shown in Column 1, is determined by the division of the total, for instance, in the first one $224.64 divided by total net sales $3,209.10, or 7% which we applied to the two preceding items, produces the amount shown in Column 8 (Part 2, Pages 464 and 465).

That is true with all of the rest of the items of this exhibit.

The amounts in Column 9 are the results of the division of the amounts in Column 8 by the amounts in Column 6. That is the first indication of the total amount in Column 8. For example, the total amounts opposite Oursler Auto Parts Company, $224.64 being divided by the total amount in column 6 of $3,209.10. We then arrived at 7% and taking 7% of the two figures appearing in the net sales column of Column 6 of $1,828.47, we arrive at $127.99 (Part 2, Page 465).

With reference to Commission's Exhibit 79-A through G, column 1 shows the locations covered. There are 83 of them. In the second column are the customers located in the various locations who bought leaf springs for the year ending June 30, 1949, or leaf springs, coil springs and chassis parts during the years ending, as shown in Column 7.

Column 3 designates the group-buying organizations in which a customer in Column 2 is a member.

Column 4 shows net sales of leaf springs during the year ending June 30, 1949, to a customer shown in Column 2 (Part 2, Page 466).

Column 5 shows the amount of warehousing and redistributing commissions allocated to the customers in Column 2 in the case of groups, from data previously presented in any one of the exhibits 70-A through 77. As to non-group members, that data was assembled from the accounts Receivable Cards of Moog Industries in the same manner as described for Exhibits 70-A through 77. In the

case of customers in Column 2 with footnote 1 preceding them, that data is taken from data presented in Exhibit 78.

Column 6 is the percentage of the amount in Column 5 to the amount in Column 4.

Column 7 indicates the contract year ending for the year 1950 in the case of groups; and it is December 31st in every instance. In the case of non-groups, in most instances it is not December 31, 1950, but from some date ending June 30, 1950, through November. In those cases where the December 31st ending is shown, there were no contracts, so the year 1950 was chosen to compare or be comparable with the group-ending date (Part 2, Page 467).

Items in Column 8 are net sales of leaf springs, coil springs and chassis parts, as previously developed in data shown on Commission's Exhibit 70-A, for groups and customers owning multiple stores. For the non-group members, the data was assembled from Accounts Receivable Ledger Cards.

Column 9 shows the amount of merchandise bonus and warehousing and redistributing commission applicable to each of the customers listed in Column 2 and they are shown on Commission's Exhibits 70-A through 78; and as to non-group members, the data was assembled from credit memorandums issued by Respondent. The percentage in Column 10 is the percentage of the amounts in Column 9 with the amounts in Column 8.

Approximately 51% of information contained in Commission's Exhibit 79-A through G is contained in the preceding exhibit described and explained and contained in Commission's Exhibit 70-A through 77. There is information on this Exhibit 79-A through G that does not appear on the preceding exhibits, which are customers who are not members of any of the groups previously presented or are not members of an organization which owns multiple stores (Part 2, Pages 468, 469). That information was gathered from Ledger Cards and credit memorandums issued by Moog to those various customers.

At this point Commission's Exhibits 70-A through and including 79-A through G were offered in evidence, and the Examiner reserved his ruling until after Cross-Examination.

Cross Examination.

With reference to Commission's Exhibit 70-A, sheet 1, line 1, the figure in Column 4, $49.70, represents an allocation to Auto Bearings and Parts Company of Nashville, Tennessee, that I made (Part 2, Page 469). I did not verify whether or not that company had received that amount, as there was no way to verify it. It probably could be verified by an examination of the records of Mid-South Distributors.

Q. And Mid-South Distributors is under complaint by the Commission at the present time, is it not?

Commission's counsel objected to the question and was sustained.

As an amendment to my above answer, it would be more accurate to say that I did not attempt to verify the figure of $49.70.

The first total in Column 4 on Exhibit 70-A, $309.60, is the parent figure from which I made these derivative figures appearing just above it. Those figures are mathematical calculations made by me (Part 2, Page 470). It could very well be that these mathematical calculations made by me were not in fact so distributed by Mid-South Distributors as I have distributed them.

Q. The figures immediately preceding the total of $309.60 are mathematical computations which you assume represent amounts which were distributed; is that not so?

A. Well, the mathematical computations are the total of $3,089.69.

Q. In other words, the figure immediately following on the same line, the figure $309.60, being 4.65 is a computation made not from dividing $309.60 by $3,360.58 but by dividing the figure appearing on 70-B, dividing the figure $3,884.69 by—

A. (Interposing) and multiply it by the $6,650.88.

Q. Columns 4 and 5 of the Exhibit 70-A and 70-B contain approximately one hundred and two figures, all of which were, or are, with the exception of two figures, mathematical computations made by you; is that correct?

A. All except the $3,884.69 are mathematical computations.

Q. That also applies to the same number of figures in Columns 6 and 7, does it not?

A. Well, column six are correct; that data in Column six are taken from the ledger cards, Mr. Butterfield (Part 2, Page 471). The figures in Columns 7 and 8 are computations made by me, approximately one hundred and two computations, with the exception of the total figure of Column 7, $9,978.71, being the figure taken from the records.

As to Auto Bearings and Parts Company, line 1, Column 1, if Nashville, Tennessee, is one of of the locations used. you will find it appearing on Commission's Exhibit 79-F. Line 1 of Exhibit 70-A is identical with Line 8 of Exhibit 79-F.

With reference to Exhibit 73, Column 7, the figure $43.69 under the heading "Commissions and Bonuses Paid to Ark-La-Tex Warehouse Distributors, Inc.": That was paid to Tyler Service Parts, which is a member of Ark-La-Tex (Part 2, Page 472).

As to whether the $43.69 was a commission or a bonus paid to Ark-La-Tex Warehouse Distributors on sales to Tyler Service Parts during the year ending December 31, 1950, the credit memo is not made out to Ark-La-Tex but is made out to the customer. I don't think you would be correct in suggesting that the figure $43.69 does not belong on this exhibit because it went to Tyler Service Parts Company, or rather the credit memo is made in the name of Tyler Service Parts Company, and Tyler Service Parts Company is on this schedule. So to show the whole story, I must show it all to you.

Q. Well, would you, then, care to amend your exhibit, to add to your footnote "This commission was not paid to Ark-La-Tex"?

A. The footnote could be changed "Per credit memo so and so, dated so and so, in the name of Tyler Service Parts Company, if that would satisfy you" (Part 2, Page 473).

As to whether it was paid to Ark-La-Tex or not, I found it during the course of my investigation of Ark-La-Tex Warehouse Distributors, Inc. It appeared on the ledger card as a credit to their account. In spite of the fact the

credit memo is made in the name of Tyler Service Parts, it was credited to the account of Ark-La-Tex Distributors, but the credit account shows it was remitted to Tyler Service Parts.

Q. What is the difference in crediting it to the account of Ark-La-Tex and paying a commission to Ark-La-Tex?

A. Well, they don't pay. The way they pay is by credit memo. There is no check issued in the case of this redistributing Commission (Part 2, Page 474).

As to whether the heading "Commission and Bonus credited to the account of Ark-La-Tex", instead of "Paid", it is all right to change the credit. The same result ends; —they don't pay for it.

I had no occasion to examine Commission's Exhibits 61 to 69, inclusive. I did not include on this Exhibit 70-A coil actions or piston rings (Part 2, Page 475).

I have examined all of the other Commission's exhibits as to leaf springs, coil springs, and chassis parts, and wherever piston rings appeared on the cards I examined, I eliminated that from the preparation of this exhibit.

Q. For instance, calling your attention to Exhibit 76, line 17, the Smyth Auto Supply Company of Amarillo, Texas, where you show no leaf spring sales for the year ending June 30, 1949. That exhibit would be consonant, would it not, with the fact that Smyth Auto Supply Company purchased eleven or twelve thousand dollars worth of piston rings, would it not?

A. I would not know whether they purchased any piston rings or not.

I had the records before me on these cards and they did not have separate cards for leaf springs and separate cards for chassis parts (Part 2, Page 476). They were all on the same card and where they showed up piston rings, I disregarded them.

Referring to Exhibit 76, Column 3, in reference to leaf springs, and Columns 4, 5, and 6 referring to leaf springs, coil springs and chassis parts, these were grouped together because the leaf spring line contains leaf springs, coil springs, and chassis parts for merchandise bonus purposes. In the catalog I do not know how many items there are in

the leaf springs, coil springs, and chassis parts line. I do not know how many items there are in leaf springs (Part 2, Page 477).

I was one month at the Moog plant in the preparation of these exhibits. I examined other things besides the Accounts Receivable Ledger. I examined a few invoices and selected copies of invoices and brought them back with me. I have not counted how many, but it might be a few off 289.

Q. I call your attention, Mr. MacDonald to Lines 6 and 7 of Exhibit 79-A.

A. Are you referring to Arkadelphia, Arkansas?

Q. That is correct (Part 2, Page 478).

Q. Now in Column 8, you show a sale to Crowe-Burlingame of $21.92. Immediately below that you show another sale to Auto Parts Supply Company of $19.76. Your Columns 9 and 10 contain the figures which you have computed. Do you have any idea what those items represent?

A. Which items?

Q. Items $21.92 and $19.76.

A. The sum of leaf springs, coil springs and chassis parts bought by those two customers in Arkadelphia, Arkansas, during the year 1950.

Counsel for Moog then presented the witness with certain invoices to verify the above two figures (Part 2, Page 479).

Q. I show you these documents and ask you whether these documents, plus this one (indicating) represents what it says? I would like to have you compute them.

A. Show me what is on here. That is coil action; this on coil action, what the dickens is that doing in here?

Counsel for Respondent: There is no amount in there is there?

A. Did you bring those work sheets I gave you a copy of? We could have checked them. Yes, sir; they total all of the amounts shown here.

Q. That is, all that I have shown you?

A. All that you have shown me (Part 2, Page 480).

Q. Now, take line 7, Auto Parts and Supply Company. Auto Parts and Supply Company, there are one, two, three, four, five, invoices and a credit memo. Those five invoices and the credit memo total $19.76?

A. That is correct.

Q. The credit memo being $174.96?

A. Correct.

Q. Now the first invoice number 7939 Ab and BB. Now BB is $38.17, and on there are the various items listed. Item number 1, U-410, $1.48. Do you know what U-410 is?

A. No, sir.

Q. Do you know whether that is a Chassis part, a Leaf Spring, a Coil spring, or a piston ring?

Mr. Schrup: I object. He has answered the question once. He said he didn't know.

Trial Examiner Kolb: Objection sustained.

By Mr. Butterfield:

Q. I show you Commission's Exhibit 15, Mississippi Spring Parts, resell net price list, U-410, net 0.55¢, dealer's net cost U-410, 0.45¢.

A. Where do you see U-410?

Q. U-410.

And I show you a picture too, on the Spring Part exhibit and call your attention to the lower right-hand and also the lower left-hand. Do you know what those things are? (Part 2, Page 481.)

A. They are U-bolts.

Q. Well, would you say that U-410 on that invoice would be a U-bolt?

Mr. Schrup: The exhibit speaks for itself.

The Witness: The exhibit calls for a U-bolt.

By Mr. Butterfield:

Q. Now, Mr. MacDonald, will you look on these invoices which I just gave you. Auto Parts and Supply Company, and see if any of these invoices other than Auto Parts and Supply Company have a U-bolt, that number U-bolt on them, or any U-bolts?

A. I see the only one—I see it only on this one invoice, Mr. Butterfield.

Q. But that figure of $1.48 entered into your computation of these figures could be that?

A. I suppose so. I didn't take any information from the invoices. I took it from the ledger posting.

Q. Now will you take a look on this and see if on these invoices which I show you—

Mr. Schrup: Excuse me. Go ahead and finish your question.

By Mr. Butterfield:

Q. (Continuing) —and see if Ozburn-Abston & Company, shown on line 1, and Crow-Burlingame Company at Arkadelphia, Arkansas, shown on line 6, in the year 1950, bought any item (Part 2, Page 482) of merchandise, the net sales of which are purported to be shown in column 8, which was comparable, identical, or of like quality, as the Auto Parts and Supply Company in the figure represented by $19.76?

Mr. Mayer: I object to that question. The witness testified that the figures were taken from Moog Industries in and of themselves. He did not testify he examined the various invoices behind or which were posted on the cards.

Now if Moog made a mistake in reflecting his invoices of this Company, this could not reflect on this witness. The proper thing would be to produce the ledger card.

Mr. Butterfield: Mr. Examiner, I think we are beyond the Ledger card point.

Mr. MacDonald said he took a figure off the ledger card. Mr. MacDonald testified that the figure he took off the ledger card is identical with the figure that appears on these invoices.

Mr. Schrup: Not so, Mr. Examiner. The figures were taken from the Ledger card. Now the witness didn't examine the invoice other than to take a sampling of invoices to bring back to check.

Mr. Butterfield: Mr. Examiner, I brought in and showed the witness the total invoices represented by the net sales figure that he found on the ledger card.

Trial Examiner Kolb: And they checked? (Part 2, Page 483.)

Mr. Butterfield: And they checked.

Trial Examiner Kolb: All right.

Mr. Butterfield: Now what I want to ask the witness, is, whether he finds any item on the Crow-Burlingame sales that is comparable with any other item on the Auto Parts and Supply Company sales.

Trial Examiner Kolb: Is it your position there has got to be a comparison between U-bolts and screws and everything else in order to arrive at the facts shown on these exhibits?

Mr. Butterfield: I think, if your Honor please, that in showing comparison of sales, that a U-bolt and a main Leaf are two entirely different things.

Trial Examiner Kolb: Are the discounts the same on them?

Mr. Butterfield: Well, on the exhibits—

Trial Examiner Kolb: No, no. Are the discounts material—in other words, they don't have different discounts between bolts and springs. The auto parts ar all bulked together and the total purchases are used as a basis for the discount; is that correct?

Mr. Butterfield: Well that, if your Honor please, I am not prepared to answer that right now, because I don't want to bind my client on making an answer of that kind.

I don't want to make that kind of a stipulation or (Part 2, Page 484) admission until I get at the facts.

What I had done was to confine myself to this one competitive community, Arkadelphia, Arkansas, as selected by the witness.

Trial Examiner Kolb: Well, we would be here for ten years if you are going to try to compare bolts and nuts and everything else.

The thing is, whether or not the discount that is allowed is based differently upon those items, or whether they are bought together and the discounts based upon the auto parts which are purchased.

Mr. Butterfield: Well, I was under the impression, Mr. Examiner, that the injury, if there was to be one, or the foundation for an injury must be based upon the sale of competitive products at different prices.

Under the Robinson-Patman Act—

Trial Examiner Kolb (Interposing): It being auto parts.

Mr. Butterfield: I wish to suggest, if the Examiner please, that an auto part made for a Ford will not fit in a G. M. C. truck, and to that extent they are not comparable.

In the auto parts industry, of course, the big thing is the service rendered by the independent garageman, and when he calls and orders an auto part he can't make substitutes. If he orders a U-bolt, you can't send him a Main Leaf (Part 2, Page 485) to substitute for a U-bolt, nor can you send him a Tie Rod End in place of a shackle.

Trial Examiner Kolb: You are getting into what might possibly be a defense rather than a cross-examination of the witness on the basis of this exhibit.

Is it your position that different discounts—or different items purchased by different customers, that is your position, then I think that will have to be taken up by defense and not by cross examination here.

All of these exhibits are confined to dollars and cents and not to profit, and the only attempt made in this exhibit applies just to categories, for instance, leaf springs.

Q. Now you considered in making these comparisons on Exhibit 79-A to G, and in making up the underlying exhibits 70-A through 78, that as far as leaf springs are concerned, they are all one and the same item?

A. No, No, No.

All the figures on all the tables pertaining to the year ending June 30, 1949, are limited to springs as described and shown on the Ledger Card under the code "S".

I don't know a thing about Commission's Exhibit 15. The code in the invoices as posted to the ledger card with the letter "S", are leaf springs. The code before a coil spring, which did not come in until the year 1950, shows "C. S." These are all classified and identified by Moog. Chassis parts are identified by the suffix "C. P." to the invoice.

Now whether they are Ford springs, Cadillac springs, or anything else, under leaf springs I have no way of knowing. That goes also for coil springs and chassis parts. Had I examined the invoices, the same results would have been presented as I have presented here, because the leaf spring line, as identified on Commission's Exhibit Number 1, takes into consideration leaf springs, coil springs and chassis parts (Part 2, Page 488). For this I am referring to Commission's Exhibit 1, which is a four-page document called "Distributors' franchise". I am not referring to leaf springs, helper springs, and spring parts, nor coil springs, nor chassis parts; I am referring (pointing) to leaf springs including coil springs and chassis parts, and I treated in making up these exhibits, leaf springs, coil springs and chassis parts as just like so many cans of beans (Part 2, Page 489). I did not take into consideration that each automobile has its own peculiar characteristic. I did not take into consideration that trucks, busses, passenger cars, and the various makes of passenger cars all use different leaf springs, different chassis parts, and different coil springs. I treated them so because they have all got the rebate depending upon the purchases. The only thing I was interested in was the amount of warehouse and distribution commission, the amount of merchandise bonus. All that I took into consideration was the rate but not the item at all (Part 2, Page 490).

Q. And in making that assumption you assumed, you say, that a U-bolt and an overload spring were interchangeable—

A. I didn't so testify.

Q. When I asked you if you treated them as if they were so many cans of beans, you understood by that question, did you not, that beans are beans, and it doesn't make any difference which can you get them out of; isn't that right?

Mr. Schrup: The gentleman is testifying as an accountant here, and if there is any question about the figures being wrong, I suggest that is proper cross examination (Part 2, Page 490).

But this gentleman's opinions on what is beans is not material.

Trial Examiner Kolb: The objection will be sustained.

Mr. Butterfield: Well, Mr. Examiner, I have about 300 documents here to go through on these exhibits, and I offer to prove in my cross examination of this witness that no effect was given to whether or not the goods were of like grade and quality, other than the fact that they are used in the automotive industry, and that a U-bolt has been treated on the same basis as a spring for the purpose of these computations.

Any chassis part, any coil spring, has been treated on the same basis as a wholly unrelated part of the various automobiles for which they are designed.

Trial Examiner Kolb: Is that your objection to this exhibit?

Mr. Butterfield: That is one of the objections to the exhibit.

Trial Examiner Kolb: Well, I would suggest you make all of your objections and I will rule on it then, will rule on the admissibility of the exhibit (Part 2, Page 491).

Q. In preparing 70-A to 79-G, both inclusive, did you take into consideration the price paid by the customers purported to be represented on there, Mr. MacDonald, as distinguished from the gross sales?

A. The price paid for individual items?

Q. No, the price paid for the billings, the gross sales billings and the net sales billings that you showed on here, Mr. MacDonald.

A. I didn't check to see if they were paid for.

Q. You didn't check to see whether they had taken advantage of any cash discount for prompt payment of bills, or any of the commercial—

A. No (Part 2, Page 493).

Q. —or any of the commercial devices by which credit is manipulated?

A. No.

Mr. Butterfield: If your Honor please, I am prepared to examine the witness rather extensively on the preparation of these documents.

But before going into such an examination, I would like to make a motion at this time for the refusal of these charts into evidence, on the following grounds:

The first ground is the jurisdictional ground which is set up in the amended answer to the complaint, and as has been heretofore argued in regard to all the other exhibits that have been offered herein.

Specific objections are made to the exhibits in this extent:

To Exhibit 70-A and B, there is no testimony by the witness that the amounts set forth on said exhibits are the actual prices paid by the purported purchaser for the products purported to be represented by the items of net sales.

The figures as to the amount of warehousing and redistribution commission set forth therein are computations made by the witness that have not been verified by the ascertainment of any fact regarding the actual allocation of the amounts to either of the respective companies set forth on the exhibit. (Part 2, Page 494).

The amounts set forth as being net sales for the year ending June 30, 1949, and for the year ending 1950, cannot be ascertained from this exhibit and has not been investigated by the witness and is not known whether or not these sales represent the sales of commodities of like grade and quality in interstate commerce.

The classifications employed by the witness in fabricating the charts, such as the classification "Leaf Springs" and the leaf springs, coil springs and chassis parts classification is not shown to be a proper classification of interchangeable and equally competitive products of like grade and quality as contemplated in Section 2(a) of the Robinson-Patman Act.

I make the same objection to Exhibit 71-A and 71-B. and 71-C.

In addition to the specific objections to 70-A and B, specifically made heretofore, and 71-A, B and C, I wish to

make to Exhibit 72 the following additional specific objection:

There is no indication on the chart as to what the facts and figures are regarding the weight accorded by the witness to sales in different periods which result in the varying percentages set forth in column 5 of said exhibit.

In addition to the foregoing objections made to the Exhibit 70-A to 72, both numbers inclusive, I wish to make an additional objection to exhibit 72; in the amount (Part 2, Page 496), appearing thereon in column 7, $49.69—$43.69 is not consonant with the general designation of the exhibit as being commissions and bonuses paid to Ark-La-Tex warehouse distributors.

I wish to also note the following additional objection to all of the aforementioned exhibits as to the classification "Leaf Springs" for the year 1949, and the classification as "Leaf Springs, Coil Springs and Chassis Parts" as a single designation or category as shown in all the said exhibits.

As to Exhibit 74, I wish to note the same objections as has heretofore been made to the Exhibits 70-A to 73, both numbers inclusive, and call particular attention to the figures set forth in column 7 of said exhibit, as not being consonant with the headings of said exhibit.

I wish to make an additional objection to the foregoing exhibits and including Exhibit Number 75, in that said Exhibit does not purport to show total net sales, or the prices paid for commodities bought from Moog Industries, Inc., by the parties whose names are set forth thereon (Part 2, Page 496).

I wish to extend that last named objection to all exhibits including Exhibit 76.

As to Exhibit 79-A through G, seven pages, both inclusive, covering 214 items in twelve States and 83 communities, I wish to voice all of the objections that have heretofore been made to all of the underlying exhibits, Number 70-A to 78, which as the witness stated or reflected in the majority of cases on this exhibit, and on the following ground:

That the witness has examined at least one item of said exhibit and the examination did not disclose that any item sold by the two competitive or presumably competitive

purchasers in, for instance, the town of Arkadelphia, Arkansas, was identical, competitive with, or of as good or like grade or quality.

I brought with me for examination by the witness originals of some 289 credit memos and invoices of which the witness has copies, for his examination, to show me one instance in any of those documents which he selected where the two customers of Moog Industries, Inc., in a single town, had purchased the same item within a reasonable period of time, so as to be in any way competitive, in fact.

In addition to those objections that have been heretofore made, I wish to also add as to all the exhibits that these documents are for the most part compilations of the witness made on unwarranted assumptions or hearsay, not supported by expert testimony, and that the witness is not qualified by training, education, or of that set forth in the amended answer set forth thereto, to state the opinions implied in the charge as compiled.

The witness has testified that he has disregarded for the purpose of these exhibits competition, product (Part 2, Page 497) competition and has treated billings as being competitive with itemized accounts of the other items, regardless of the price shown on the invoice; treated each and every product in the classification selected as being competitive and interchangeable with every other product manufactured by Moog Industries, Inc., in the classification.

The terms used and the language implied in the description of the various exhibits, as shown in the headings, are highly prejudicial to the respondent and assume as facts —ultimate facts which can be determined only by the Commission, and used throughout these exhibits the terms, price and comparison, and sales in comparison, when as a matter of fact no prices are shown on any of these exhibits.

No comparisons are made that are proper and relevant to this proceeding.

Nothing is shown in regard to the marketing conditions for the competition of the products of Moog Industries, Inc., with any other competitor or with the customers of any of them.

No attempt has been made in these exhibits purporting to show the conditions and selected markets as to what the markets for competitive products are in those markets.

No attempt has been made to properly evaluate market conditions, the condition of trade, commerce, interstate commerce, commercial status, in which this proceeding is (Part 2, Page 498) purported to be set.

I also wish to submit to the Examiner serious consideration as to whether or not admission of documents such as these into evidence may not be highly prejudicial—in the premises under the law as to deny due process, violation of the Bill of Rights of the United States Constitution, of the Constitution itself; and a violation of the Constitution, Bill of Rights, State of Missouri,, and of each and every other State of the Union of which this company does business.

I wish to further state the submission of these documents is tantamount to, and from the way they have been prepared and in the light of the testimony which has been given by the witness, is tantamount to the denial of due process and places an unconscionable and almost insurmountable burden and task on the respondent in defense of this case, under the defenses available under the Act, and under the law, and the Constitutional rights and guaranties which are enjoyed by all respondents in the American market.

I cannot too fully emphasize the importance of selecting bare figures and presenting them in the form of these charts and exhibits for the purpose of attempting to raise an assumption that they are based on the sales of goods of like grade and quality, and from that attempting to raise an assumption or possibility of injury (Part 2, Page 499).

Our complaint is brought on price difference. Price discrimination is what the respondent is charged with.

These exhibits do no more than cloud the waters.

The attempt here seems to be not an attack on price discrimination but an attack on other things from which there may be some assumptions, unwarranted I feel, that should be made subject of proof, to which the respondent can properly direct the defenses available to him.

It is true that the Commission needs make only a prima facie case. Yet that prima facie case must be of such a nature and of such a definitiveness that the respondent has a reasonable opportunity to meet the direct proof without the necessity of having to cover as many items as are set forth here.

The burden has been placed on this respondent, I feel, by these exhibits, if they are introduced in evidence, which would be—as I repeat—unconscionable.

Trial Examiner Kolb: Do you want to answer that?

Mr. Mayer: Just a moment, please, Mr. Examiner.

Trial Examiner Kolb: All right, you may proceed.

Mr. Mayer: We feel that largely the objections raised by counsel to the introduction of the exhibits which have been identified this morning are largely the minimus and is a great portion toward the weight to be given to the exhibit rather than to its admissibility (Part 2, Page 500).

We feel that the exhibits are to be properly admitted into evidence and form an essential part of the prima facie case of the counsel in support of the complaint.

Some of the objections perhaps could be answered on the basis that if leaf springs and coil springs and chassis parts are an improper classification, then it seems to me that should be laid in the Moog Industries, because this is a reflection of the books and records of Moog Industries, Inc., and it is based upon that general classification.

Naturally the exhibits don't show total purchases.

The very exhibit in an individual case itself limits itself to leaf springs, or coil springs, and chassis parts.

The state of the competition or competitive prices is without the scope of this complaint, such as it is not industry-wide but directed at prices and products of Moog Industries, Inc.

Trial Examiner Kolb: Did you have something else?

Mr. Mayer: For the most part we feel that the objections are largely frivolous, and that there is no basic objection to the admission of these documents into evidence, if the Examiner please.

Trial Examiner Kolb: The objection will be overruled.

They will be received as Commission's Exhibits number 74-A through 79-G.

Mr. Mayer: That should be 70-A, Mr. Examiner.

Trial Examiner Kolb: 70-A. Thank you.

Mr. Butterfield: Due to the extent to which these charts go, I move that in order to prevent doing undue injury to the respondents, the documents be placed under seal for the use only of the government attorneys and the Respondent, until such time as a final order has been issued in this case.

Thereupon Commission's Exhibits 70-A through 79-G were received in evidence (Part 2, Page 502).

At this point counsel for the Commission closed their case. Counsel for Respondent then made a motion to dismiss the Complaint and the Trial Examiner stated that he would hear his argument thereon.

Mr. Butterfield: Without intending in any way or meaning to waive any defenses fortified by the Act, by the administrative procedure act, but solely in the interest of making a test of the sufficiency of the evidence and on the issues raised by the complaint and answer, I move at this time for dismissal of the complaint on the ground that no injury has been shown to exist; or more specifically, no single instance of a specific case or a single fact which would show the business practice of the respondent tends to create a monopoly in any line of competition to substantially lessen competition or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or were the customers of either one of them.

The burden on the trial attorneys under the complaint, as I see it, is to show that type of discrimination in price which is treated under Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

This the proponent has failed to do.

The catalogue prices have been introduced; a paucity of testimony by wholesalers in regard to credit practices, and exhibits, have been introduced showing sales without relating the sales to any specific product, without de-

lineating any particular line of commerce purported to be injured or destroyed or in any in which there was any tendency to create a monopoly that will lesson competition, has been shown (Part 2, Page 503).

No attempt has been made to show the extent of or proportion of the market in any single line or classification of lines which the respondent purported to serve or did serve in comparison with any other competitor in the same field dealing in products of like grade and quality.

Respondent submits that no prima facie case has been made by the Government under this complaint.

But should the Trial Examiner see fit to overrule the motion to dismiss, the respondent is ready, willing and able to proceed to avail itself of whatever defenses are available under the Act, particularly the competition and justification, and such other and further defenses as are available.

Mr. Mayer: Mr. Examiner, we feel that the record shows in detail the price and practices of Moog Industries, Inc.; that it clearly shows the existence of competition, the value placed upon the various discounts by the buyers.

It shows different discounts to competing buyers, and it shows sales to group buyers based upon an amalgamation of purchases.

We feel that in the above steps we have gone further than that required by the Supreme Court under the Morton Salt decision, and that we have shown injury to both lines of commence in which Moog is engaged (Part 2, Page 504).

We respectfully ask for a rule denying the respondent's motion, therefore, and setting a date for the beginning of the respondent's defense.

Trial Examiner Kolb: The motion to dismiss the complaint is denied (Part 2, Page 505).

Respondent Moog Industries' Evidence.

St. Louis, Missouri, June 2, 1952.

The hearing was held for the purpose of receiving evidence in opposition to the allegations of the complaint.

Mr. Butterfield: If your Honor please, the motion to strike exhibits in evidence and dismiss the complaint is in the form of a written motion. At the conclusion of the case for the Complainant, at the last hearing there was an oral motion made similar to this upon which your Honor ruled, and I offer this written motion at this time, at the commencement of the respondent's side of the case, in order to keep the record straight on the position of the respondent in this matter.

Trial Examiner Kolb: As I recall, this motion was argued at the close of the Commission's case, is that right?

Mr. Butterfield: Yes, it was argued at the close of the Commission's case, but it wasn't put into a written form and this motion is put into a written form, and I ask that your Honor file this with the Secretary of the Commission to become the initial step in the Respondent's case (Part 2, Page 509).

Trial Examiner Kolb: The motion will be filed, and as it has been previously ruled upon on the record, in order to keep the record straight, I will at this time deny the motion. This refers to motion to strike exhibits in evidence and dismiss the claim.

Mr. Butterfield: Now, the second motion I have, if your Honor please, is a motion for a bill of particulars.

Trial Examiner Kolb: It is admitted that the suggestions in support of the motion for the bill of particulars, a previous motion, was denied. Since the Commission's case has now been completed and closed, I don't see that a motion of this nature would be proper at this time. I will deny the motion (Part 2, Page 510).

ANTON M. GOETZ testified as a witness on behalf of Moog Industries as follows:

Direct Examination.

My name is Anton M. Goetz (Part 2, Page 518). I am Secretary-Treasurer of Moog Industries. I have been with them since June 17, 1940.

I have examined Commission's Exhibit 79-A. The witness' attention was then called to Line 3 of that exhibit, Arkadelphia, Arkansas, and the two names, Crowe Burlingame Company and Auto Parts and Supply Company. The witness' attention was then called to the columns entitled "Leaf Springs, Coil Springs, and Chassis Parts", "Merchandise Bonuses," and "Distribution Commission" and the item immediately below that, $19.76, and the witness stated that he had brought with him the original invoices covering those items. Respondent's Exhibits 1-A to 1-K, inclusive, were then marked for identification (Part 2, Page 514). Respondent's Exhibit 1-A is a dittoed copy of the original invoice. The original invoice is in the hands of the customer, Auto Parts and Supply Company of Arkadelphia, Arkansas. These exhibits were taken from the files of Moog Industries and were made available to the investigators for the Federal Trade Commission prior to the commencement of this complaint (Part 2, Page 515). These exhibits were also made available to the attorneys for the Commission after the commencement of this complaint and to the accountant, Mr. Steele (Part 2, Page 516).

Thereupon Respondent's Exhibits 1-A to 1-K were offered and received in evidence.

With reference to Respondent's Exhibit 1-A, chassis parts are included in that exhibit, being Six ES-142's (Part 2, Page 517).

Comparing the invoices reflecting sales to Crow-Burlingame Company for the period ending December 31, 1950, with the invoices of the Auto Parts and Supply Company for the same period, there is no item reflected in the Crow-Burlingame invoices that is also reflected in the Auto Parts and Supply Company invoices (Part 2, Page 518).

Thereupon Respondent's Exhibits 2-A through 2-J were marked for identification.

Thereupon Respondent's Exhibits 3-A through 3-H were marked for identification.

The invoices, Respondent's Exhibits 2-A through 2-J, are the invoices reflected in Commission's Exhibit 79-B, the fourth item, Searcy, Arkansas, sales to Crow-Burlingame Company and W and R Motor Supply Company. There are no items on these invoices purchased by Crow-Burlingame Company that are reflected on the invoices of purchases by W and R Motor Supply Company. There are no purchases made by the one that were made by the other (Part 2, Pages 519, 521).

Referring to Respondent's Exhibits 3-A to 3-H, inclusive, and reflecting sales, as appears on Commission's Exhibit 79-G, the third item to Crow-Burlingame Company and the Motor Supply Company at Marshall, Texas, these invoices correctly reflect figures appearing under the heading "Leaf Springs, Coil Springs and Chassis" Parts on that exhibit, for the year ending 12-31-50 (Part 2, Pages 521-522). There are no items on these invoices purchases by Crow-Burlingame Company, Marshall, Texas, that were also purchased by the Motor Supply Company.

With reference to Respondent's Exhibit 3-A, that shipment was not made to Marshall, Texas, but was made to Atlanta, Texas. Commission's Exhibit 79-G having included it in sales to Marshall, Texas.

Thereupon Respondent's Exhibits 2-A through J, and Respondent's Exhibits 3-A to H were offered in evidence (Part 2, Page 522).

In response to a question by the Trial Examiner, the witness stated that Crow-Burlingame and Auto Parts Supply are both jobbers, engaged in selling automotive parts; that Crow-Burlingame purchase spring parts and main leaf and Auto Parts Supply purchase overloads, overload kits, spring parts, leaf springs, main leaves, and some chassis parts; that these purchases by Crow-Burlingame and Auto Parts Supply came within the line that Moog carries as leaf springs, coil springs, and chassis parts. The witness also said that was true with reference to the

other two items, referring to the comparison between Crow-Burlingame and W and R Motors.

The Trial Examiner then announced that in view of these statements he would now entertain a motion to strike, and counsel for the Commission made a motion to strike from the records Respondent's Exhibits 1-A through 1-K, Respondent's Exhibits 2-A through 2-J, and Respondent's Exhibits 3-A through 3-H (Part 2, Page 523).

Counsel for Moog Industries, arguing against the Motion To Strike, stated that the invoices do not reflect that Crow-Burlingame or Auto Parts and Supply Company purchased the same items that the other company purchased; that the parts so sold are not interchangeable parts, that is, if a part is bought by one company, in order for it to compete with another company, the other company must have bought the same part, because if you go to Crow-Burlingame to get a part for a Pontiac or a Chevrolet, or an International Harvester, and Crow-Burlingame has not bought any of those parts but Auto Parts and Supply has, then there was no competition between the two companies at all; that these auto parts are not like salt; that salt is a necessity and is interchangable; that in the Morton Salt case the customers were given certain discounts and other discounts to another class of customers on the same item. That in the Staley case it was corn syrup (Part 2, Page 524). But that in this particular field of industry if one customer buys nothing but piston rings and another customer buys nothing but leaf springs, the two are not competitive, and that the prices made to one have no effect on the prices made to the other. The Trial Examiner then advised Moog's counsel that there were no piston rings in this line. Counsel for Moog then stated that he was explaining to the Trial Examiner what these automotive parts were; that not all piston rings will fit in the same car; that one kind of a piston ring goes in one car and another kind goes in another car; that some companies service certain cars, and therefore are not competitive in the line.

Trial Examiner Kolb: Your position is then that one customer purchasing "Hayes" piston rings and another purchasing a competitive brand are not in competition with each other?

Mr. Butterfield: No, if one purchases piston rings and another purchases leaf springs, they are not in competition.

Trial Examiner Kolb: We have no case where one purchaser buys piston rings and one purchases leaf springs.

Mr. Butterfield: Well, if one purchases overload springs for a G.M. truck and the other purchases passenger car leaf springs, they are not in competition with each other. Now, both of those are springs but they are not in competition (Part 2, Page 525).

Trial Examiner Kolb: Well, as I understand it, the leaf spring, coil spring and chassis part is one line which is sold to jobbers who are engaged in reselling to fleet owners, automobile repair places, filling stations, etc., where any of these parts might be used. The discounts which have been set by the Respondent on this line apply equally to any item within the line. Under the circumstances, I do not believe it is necessary or material to this case that the Commission show that the identical part has been purchased by two competitive jobbers in order to maintain this proceeding, and I think it is immaterial whether or not one purchased leaf springs and another purchased heavy duty springs or something of that sort, and for that reason I am going to sustain the motion to strike the exhibits, Respondent's Exhibits 1 to 3 inclusive, and also the testimony of Mr. Goetz with reference to the difference in the articles purchased by the various customers.

Mr. Butterfield: Mr. Examiner, I'd like to ask on the record whether it is the theory in this proceeding—now, I have asked for a bill of particulars, is it the theory on this record that there does not have to be any injury shown to any competitor or the customers of either of them, that it doesn't have to be shown any tendency to create a monopoly (Part 2, Page 526), any substantial lessening of competition or any prevention, injury or destruction of competition, but the mere showing of an offering without a purchase of different prices to different customers is sufficient to make a prima facie case, irrebutable, of which the Commission will take official notice and will find a

per se illegal price discrimination. Now, if that is the case that I have to meet, then I will have to—

Trial Examiner Kolb: That sounds like when do I stop beating my wife.

Mr. Butterfield: No, but I have offered these exhibits which the Examiner has stricken, showing the purchases and sales for the period selected by the Government in its Exhibit 79, and the invoices do not reflect that the so-called competitor and I am being, by this motion, precluded from showing what it is that these customers bought. Now, the exhibits here, so far as the Government's case is concerned, do not show a single item, it takes a category, two categories out of three categories the Moog Industries, Inc., uses for internal purposes and for marketing purposes and has taken figures without showing the items sold, and on the basis of that, attempting to establish a prima facie case of price discrimination without allowing the respondent to show what these figures consist of, what the items were that were purchased, to show that these were non-interchangeable items (Part 2, Page 527).

Trial Examiner Kolb: As long as they come within the line of leaf springs, coil springs and chassis parts on which the discounts are based and which are normally sold to jobbers in that business, I see no occasion for going into whether it was a leaf spring, heavy duty, light duty or anything else. I might go along with you if you were talking about one man that was in the grocery business and another man that was in the hardware business, discount with reference to that, but you can't carry that into the one line which is being handled and sold to customers usually all of them buying—I mean, the customers buying the entire line or so much as they need in connection with their business. If we carry this down to the nth degree on your argument, the Commission would have to show that, for instance, Crow-Burlingame bought nuts and the other bought bolts and, therefore, they were not in competition with each other because one had bought nuts and one had bought bolts.

Now, if you are going to have to show one bought one-half inch bolts and another bought 1½ inch bolts, I think it is carrying it to absurdity, and I think you have gone as

far as you can go here when you show the purchases were made in a particular line which is customarily sold to the customers which are purchasing and on which the discounts are allowed on the entire line regardless of whether it is one item in the line or another item in the line (Part 2, Page 528).

Mr. Butterfield: Now, all of these lines are within the automotive parts field. I mean, there is piston rings, and there is springs and there is coil springs and there is chassis parts. Now, all of those—now, in making its case, I can't tell whether the Government is claiming about the piston ring pricing practices of Moog or not.

Trial Examiner Kolb: The charts do not cover piston rings, so I don't know how you can raise a question as to whether or not piston rings are involved. The charts which have been introduced are limited to leaf springs, coil springs and chassis parts which is one line; piston rings are a separate and distinct line.

Mr. Butterfield: Would the Commission—I mean, if the respondent fails to negative injury, would the Commission enter an order covering piston rings in the absence of the inclusion of piston rings in the evidence?

Mr. Schrup: The evidence is not restricted to the charts in evidence; there is other evidence on it.

Mr. Butterfield: Piston Rings are contemplated in this proceeding?

Mr. Schrup: Yes.

Mr. Butterfield: They are?

Mr. Schrup: Piston rings—I direct your attention, Mr. Butterfield, to Exhibit 1—are subject to the same retroactive discount as the coil action line and leaf line. I mean as (Part 2, Page 529) I gather, the segregation of these three lines is merely for the convenience of your company; there is discrimination in all three.

Mr. Butterfield: Now, in so far as piston rings are concerned—

Mr. Schrup: Do you want all this argument on the record or—

Trial Examiner Kolb: Do you want it on the record?

Mr. Butterfield: I'd like to have this portion of it on the record, if your Honor please, because it goes to what I am trying to make my defense here. Now, the piston rings are not included in the charts but the piston rings are included in an exhibit showing the offering of a discount to piston ring customer, is that not true?

Mr. Schrup: Are we arguing on this motion to strike or is this the final argument before the Commission? We put our case in, our prima facie case is in.

Trial Examiner Kolb: Mr. Butterfield asked a question as to whether or not if the case showed price discrimination on coil spring parts, whether or not an order would be entered on piston rings. I might very quickly and briefly answer that by saying if a price discrimination is found on any line in which you are operating, the order would prohibit you from entering into price discriminations—period, which would cover all your lines. In other words, the Commission would not enter (Part 2, Page 531) an order on price discrimination on coil springs and then have to try the case again on piston rings or something else. In other words, once having found the practice has existed, the order is to stop the practice. The Commission wouldn't care if it was piston rings, chassis parts, coil springs or what it might be, if the respondent was selling those at the time under the same basis.

Mr. Butterfield: Well, my preliminary evidence here, Mr. Examiner, is directed to the question of injury and I had supposed this foundation would be laid by showing what it was that the various customers bought.

Trial Examiner Kolb: Well, I think you are unduly encumbering the record with immaterial and irrelevant testimony. That is the reason I have stricken the testimony up to date. I permitted you to put it in to find out what it was all about, whether there was some basis for your contention, but as I see it, there is no basis for any contention in view of the fact that the purchases by the several customers were from the same particular line and certainly I am not going to go into whether or not the individual item was purchased by two customers before you can show a price discrimination where it is in the same line and the discount applies to both the same.

Mr. Butterfield: Well, I don't believe it is necessary but I will take exception to the striking of these exhibits from the evidence (Part 2, Page 531).

Trial Examiner Kolb: Let the record show exception by attorney for respondent.

Mr. Butterfield: And I would like to reserve that question for an appeal to the full Commission, and I have other evidence here that I'd like to make an offer of proof on, and I have documents that I'd like to have marked to make an offer of proof on, going directly to this question of competition and injury (Part 2, Page 5 2). * * *

Mr. Butterfield: If your Honor please, referring to FTC Exhibit 79-A, item No. 1, Birmingham, Alabama—

Trial Examiner Kolb: 79?

Mr. Butterfield: Yes, 79A, Birmingham, Alabama; and Exhibit No. 67 also—Exhibits 67 and 79-A. Exhibit 67 covers Alabama; Exhibit 79 covers quite a few places. Well (Part 2, Page 532), the whole exhibit; 79-A to 79-F covers 83 communities in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas. And also this has reference to another exhibit, Exhibit 72—Exhibits 67, 72 and 79-A.

Now, I have prepared a series of exhibits consisting of 38 pages of exhibits, supported by 429 documents, being the original invoices covering sales in Birmingham, Alabama for the period set forth in Exhibits 67, 72 and 79-A. In view of the fact that exhibits 1, 2 and 3 series relating to Exhibit 79-A, 79-B and 79-G, being the original invoices from which the figures were taken for those exhibits, were stricken from the record this morning, I will offer these analyses and invoices to show how these sales to the various customers break down, directed to this problem of injury and competition or to destroy competition with the customers of any of these purchasers.

I can have these documents identified and marked and offer them in evidence and then make my offer of proof in the event the Commissioner strikes these documents. Now, I don't know whether to make my offer of proof now or offer the original documents on this work that's been

done. There has been about 60 man days of work put in on these things (Part 2, Page 533).

Respondent's Exhibits 4-A to 4-Z-22, inclusive, and Respondent's Exhibits 5-1 to 5-502, inclusive, were marked for identification.

Mr. Goetz then resumed testifying.

Respondent's Exhibits 4-A to 4-Z-22 were either prepared by me with another person or were checked by me after another person had worked on them. We obtained the information shown on these charts from bookkeeping copies of invoices in our files, bookkeeping copies of the original invoices, and they are marked for identification "Exhibits 5-1 through 5-502." All of these invoices refer to the City of Birmingham, Alabama, for the period covered in Commission's Exhibits 67, 72, and 79-A (Part 2, Page 534). One set of these exhibits show purchases by only one of the companies in Birmingham, Alabama, another shows purchases of parts by two of the three companies that purchase leaf springs, coil springs and coil action parts, and another shows purchases by companies of parts where all three companies purchased the same parts. There are 27 pages of the singles; there are 9 pages of the doubles; and 12 pages of the triples. There are 369 items covered altogether in these exhibits, none of them being interchangeable items. (Part 2, Page 535).

Thereupon Mr. Butterfield offered Respondent's Exhibits 4-A to 4-Z-22, as well as Respondent's Exhibits 5-1 through 5-502 in evidence.

Mr. Schrup: With the Examiner's permission, I would like to ask a few questions before making my objection. Permission was granted by the Trial Examiner.

In response to questions from Commission's counsel, Mr. Goetz stated that the exhibits which he had just identified embraced the leaf spring line, including coil springs and chassis parts, and the coil action line; that they do not embrace any piston ring line except some of the five hundred numbers; that C. E. Davis Company, a customer, was embraced in the piston ring line (Part 2, Page 536); that all these distributors are not necessarily furnished with the various catalogs of the various parts, from which they can

order, as it depends on what they buy; that the witness had never counted how many items were embraced in the leaf spring line, including coil springs and chassis parts; that he could not say how many part numbers there would be; that it would be several thousands, because there are a lot of items listed that are not sold.

Counsel for the Commission then asked the witness with reference to the leaf spring line, including coil springs and chassis parts, how much would it cost a distributor to stock all of those items and sizes (Part 2, Page 537). The witness answered that they have what they term "Opening Stock Orders" that have the amount; that he didn't know what the amount would be, as each six months or so they get up a new list; that an approximation would be from $300 to $500 for chassis parts for each. The witness stated that he hadn't the slightest idea how much it would cost a distributor to stock every item and size that was offered for sale, embraced by the leaf spring line, including coil springs and chassis parts, if a distributor desired to stock all the items and sizes; that no distributor actually did that because there were lots of unpopular items that are non-stocking items, and when they get a call for that item they order directly from us (Part 2, Page 538); that the amount of annual purchases that each distributor makes from Moog of the leaf spring line, including coil springs and chassis parts, varies from year to year, depending upon the line that he purchases; that it will vary in the amount as to annual dollars, as to the different items purchased, and as to the line within the line that he purchases.

Mr. Schrup: Well, if your Honor please, I will renew the objections heretofore made to series 1, 2 and 3 of Respondent's Exhibits, that they be stricken from the record particularly with reference to those exhibits which seem to be identical with the previous exhibits, which disclose parts not purchased in common by the three purchasers in Birmingham, Alabama.

Mr. Butterfield: The Exhibits 1, 2 and 3 were original invoices reflecting the sales made to certain purchasers in Searcy, Arkansas, Marshall, Texas and Arkadelphia, Arkansas, and there was one in there that evidently was included in error, it was a sale to Atlanta.

Mr. Schrup: That was a drop shipment.

Mr. Butterfield: No, it was shipped directly to Atlanta as I remember the exhibit.

Mr. Schrup: It was purchased, however, by the customer in Searcy?

Mr. Butterfield: And sent to Atlanta, but it was included, the amount was included in the Marshall Texas (Part 2, Page 539) comparative chart that was made up, 79-G.

Mr. Schrup: Well, that was a resale. He gets a profit on it.

Mr. Butterfield: There was no exhibit showing an analyzation of those regional invoices, those were just the original invoices, one, two and three, which is the basic material from which all of the sales must be eventually obtained. All the records that the Federal Trade Commission examined were these invoices, the basic records, that is, Exhibits 1, 2, and 3, and those were stricken this morning. Now, Exhibit 4 is an analyzation of Exhibits 5-1 to 5-502, and those are the original invoices for the town of Birmingham, Alabama.

Mr. Schrup: That isn't the point, Mr. Butterfield. We aren't questioning the original invoice, the objection is made for the purpose you are offering them.

Mr. Butterfield: I am offering these to show what sales Moog made in Birmingham, Alabama; the others were offered this morning to show the sales made in Arkadelphia, in Marshall and in Searcy, Arkansas, which was not shown on any exhibit which has been heretofore introduced.

Mr. Schrup: The exhibits serve no purpose—that is, the purpose for which you offer these exhibits is the basis for which we are objecting to them. The charts are based on those exhibits, it is true, but the exhibits are of no useful purpose as we see it. (Part 2, Page 540).

Mr. Butterfield: Well, they are introduced for the purpose of negativing the charge of injury which has been made here.

Mr. Schrup: And that is the basis upon which we have objected.

Mr. Butterfield: Well, I think we have a right to negative injury.

Trial Examiner Kolb: Mr. Butterfield, the Birmingham sales appear on chart No. 67, covering the coil action, Commission's Exhibit 72 and Commission's Exhibit 79-A, is that right?

Mr. Butterfield: That is correct.

Trial Examiner Kolb: And you are not questioning the correctness of the figures that appear on those three exhibits and on the tabulation?

Mr. Butterfield: Well, let's see, just a minute, if you please. Yes, I am questioning the figures shown there as being comparative sales and commissions to customers in specified localities, that is comparison sales.

Trial Examiner Kolb: But you are not questioning the correctness of the figures showing the net sales to the individual customers as set out in those exhibits, is that correct? (Part 2, Page 541.)

Mr. Butterfield: Well, there is one there—my next exhibit, C. E. Davie, that $94.70, that was an error and Davie shouldn't appear on there at all, on that chart.

Trial Examiner Kolb: Is he located in Birmingham?

Mr. Butterfield: Yes, he is located in Birmingham. But he shouldn't appear on this chart because he didn't buy any leaf springs, coil springs or chassis parts. That was an error.

Mr. Schrup: Was that an error committed on the books of the Moog Company?

Mr. Butterfield: Well, it was an error that checks out and shows that Davie didn't purchase—I mean there are no invoices to Davie for those particular parts.

Mr. Schrup: Well, I understand the accountant did not go through the invoices but went through the books of the company.

Mr. Butterfield: Well, that might have been, but the invoices were available, and, of course, when we analyze this, that shows up.

Mr. Schrup: Well, that specific part of Commission's Exhibit 79-A, we have no objection to correcting it. If the

chart is incorrect on that particular figure, we will certainly agree to correct it.

Trial Examiner Kolb: These exhibits will have nothing to do with the Davie account except there wouldn't be anything in there at all?

Mr. Butterfield: Yes, because he didn't purchase that (Part 2, Page 542). Now, as to the other figures on the chart, those penny figures there have not been proved out as yet.

Mr. Schrup: Read that back, please.

(Mr. Butterfield's remarks read by the reporter.)

Mr. Butterfield: We don't know yet whether those figures are the exact figures or not and I wouldn't want to be precluded from questioning the accuracy of that if it becomes necessary in the course of this proceeding.

Mr. Schrup: It is de minimis.

Mr. Butterfield: It isn't de minimis because the problem—well, as I understand it, we are not involved in dollars and cents, we are involved in a question of competition.

Trial Examiner Kolb: That is what I was getting at; what I was trying to find out. The exhibits which you are now offering—

Mr. Butterfield: They have all the material in there.

Trial Examiner Kolb: —they are not offered for the purpose of contesting the correctness of any figures appearing on these—

Mr. Butterfield: They are not offered for the purpose of contesting, but should it appear from these exhibits there are errors in there, why, the Respondent would like to reserve the right to correct those figures. These exhibits are offered—

Trial Examiner Kolb: They have to be offered for one purpose or another. You say they are not offered for the purpose of correcting these exhibits (Part 2, Page 543).

Mr. Butterfield: No.

Trial Examiner Kolb: All right.

Mr. Butterfield: These are offered for one and only one purpose and that is to lay the groundwork for the

negativing of the charge of price discrimination that the FTC has made against the respondent. That is the purpose of these exhibits.

Trial Examiner Kolb: By showing that these customers in Birmingham, Alabama have not purchased the same merchandise?

Mr. Butterfield: Yes, and further, that those who have purchased the same merchandise were not injured themselves, nor was anyone injured, nor was competition substantially lessened, nor does Moog enjoy or even—there is not even a possibility of Moog enjoying a monopoly position in the City of Birmingham. That is limited to the City of Birmingham now. And, of course, that is the thesis of the respondent's defense for all of the communities shown in these exhibits, and all of the trading areas.

Mr. Schrup: If the Examiner please, you have already ruled with reference to certain portions of similar exhibits on 1, 2 and 3 offered by the respondent. Now, as to the latter part of the grounds of respondent's counsel, there is no relevancy or materiality to that at all.

Trial Examiner Kolb: As I understand it, since they are not offered for the purpose of showing any discrepancy in the (Part 2, Page 544) tabulation, but solely for the purpose of showing that the customers mentioned did not all buy the exact same merchandise, except in certain instances where I believe three of them did, I will sustain the objection to the documents as being irrelevant and immaterial to the issues of this proceeding.

Mr. Butterfield: Mr. Examiner, in the statement made that these were offered solely for the purpose as stated by the examiner, it was not my intention to limit the introduction of the invoices from which the sales were made to these customers in Birmingham to that particular issue. As I stated, the purpose of the introduction of these invoices goes to the meat of this controversy, that is, whether or not Moog did or did not engage in illegal price discrimination contrary to Section 2-A of the Clayton Act as amended by the Robinson-Patman Act.

Trial Examiner Kolb: In what way is that relevant?

Mr. Butterfield: These show the sales Moog made in this period. That is something which has not yet been

hown in the record. The FTC chose not to show those sales in Birmingham for purposes peculiarly within the knowledge of the counsel supporting the complaint. But the respondent must show what he did in Birmingham in the face of this exhibit that has been put in since the exhibit was admitted over objection of counsel for the respondent, and since the motion to strike this exhibit from the files has been overruled and the respondent (Part 2, Page 545) is in no position to make a limited offer of the basic invoices from which these Birmingham sales were made for the period, and I don't intend to make a limited offer with regard to the basic invoices.

Mr. Schrup: Personally, to be very frank with you, your offer doesn't make sense to me. We have a chart 79-A which purports to show uncontestedly the dollar and cents sales in Birmingham. That is all we need. We don't have to have thousands of invoices in this record.

Mr. Butterfield: That is not the fact, that this is uncontestable. The showing made by this chart is contestable.

Mr. Schrup: What are you contesting? One minute you say yes, one minute you say no, we can't make head or tail out of you.

Mr. Butterfield: I could not permit this exhibit to go in and official notice taken of the fact that no attempt has been made by the respondent to prove what the sales of Moog were, what did they sell?

Mr. Schrup: Well, you have made your offer and it has been ruled on. You made your attempt.

Mr. Butterfield: Has there been a ruling, Mr. Examiner, and exclusion of these exhibits?

Trial Examiner Kolb: The invoices show what Moog sold, don't they? (Part 2, Page 546.)

Mr. Butterfield: That's right.

Trial Examiner Kolb: What does the tabulation show?

Mr. Butterfield: The tabulation shows what they sold and to whom.

Trial Examiner Kolb: Doesn't the invoices show that?

Mr. Butterfield: The invoices also show that.

Trial Examiner Kolb: What is the purpose of the invoice?

Mr. Butterfield: The tabulation is made—it is an analysation made by the respondent of these invoices for the purpose of—it is a tabulation made of these invoices for the purpose of showing what items were competitive and what items were not competitive.

Mr. Schrup: I think there now is the answer, it finally comes out. It is the same thing that has been ruled on in Exhibits 1, 2 and 3. That's what I have been telling you. You must beat yourself coming around the circle. It is another attempt in an indirect way to get the exhibits in, similar to Exhibits 1, 2 and 3, which were stricken on my motion before lunch.

Trial Examiner Kolb: We will try it again. The purpose of the offer of these exhibits is to show that competitive or non-competitive items were purchased by the various customers which are listed on Commission's Exhibit 79-A, 67 and 72, in Birmingham, Alabama (Part 2, Page 547).

Mr. Butterfield: By competitive and non-competitive, I wish to be understood. I don't mean that any of these invoices show a condition of no competition in Birmingham. I used the word "non-competitive" in a very limited sense, meaning that these items were not purchased by any other customer in Birmingham than the ones shown on these invoices as analyzed in these charts.

Trial Examiner Kolb: These charts show both competitive and non-competitive items.

Mr. Butterfield: Unfortunately I used a term there that I think I shouldn't use since—

Trial Examiner Kolb: Identical and non-identical I think is what you mean.

Mr. Butterfield: I am not using the word "competitive" in the sense of the word in the statute.

Trial Examiner Kolb: Identical—

Mr. Butterfield: Identical and non-identical, all of these items are non-interchangeable, there is no substitution of one part for another. This is not something that can be used for one purpose and then can be—someone else

can use it as a makeshift for something else. This part has only one purpose. And there were sales of parts, the single purpose parts. There were 329 separate items sold in Birmingham of which 291, I believe—

The Witness: 369.

(Part 2, Page 548.)

Mr. Butterfield: 369.

The Witness: Excuse me, the total is 531 altogether.

Mr. Butterfield: 531 items.

The Witness: And 369 were individually sold.

Mr. Butterfield: 369 were individually sold.

Mr. Schrup: Just a minute. I don't think that is proper; after all, we have an objection made and we have a ruling made, and now Mr. Butterfield is trying to put in the record indirectly what he couldn't get in directly. I don't think that is proper procedure.

Trial Examiner Kolb: Well, I want to know the purpose for which this is being offered before I make my ruling so the record will show why I made the ruling, and that is what I am trying to get down to.

Mr. Butterfield: Let me put it this way: The Government—

Trial Examiner Kolb: Let me put it this way. As I understand it, your offer of these exhibits is to show that the Commission has failed to establish the fact that no identical items were purchased by each or two or three of the jobbers or customers located in Birmingham, Alabama.

Mr. Butterfield: The Commission has failed to establish the sale of any part, any single part in Birmingham, Alabama. Not any—not one single part of Moog Industries has a sale of that been established.

(Part 2, Page 549.)

Trial Examiner Kolb: Well, I held this morning and I am still of the same opinion, that it doesn't make any difference whether or not it was a bolt or a nut or a leaf spring, if it is part of the line which is being sold to the customers as set out in their catalog for automotive parts to be used in the repair and replacement of automotive parts by garage men and other parties who do repair work, and

as I understand this offer is made to show that the identical parts were not purchased by the separate customers and, therefore, there is no competition between the two, and no injury to competition. Am I correct in that statement?

Mr. Butterfield: Your Honor, this is only part of the case.

Trial Examiner Kolb: Am I correct in my statement, as far as I have gone?

Mr. Butterfield: That is part of it, if your Honor please; that is only part of the case. I am not resting the whole respondent's case on this single showing. This is the foundation evidence from which the respondent hopes to build a defense against the charge of injury to competition or any offense against the Robinson-Patman Act, and without those invoices in the record, it is impossible for the—

Trial Examiner Kolb: From the evidence you are attempting to build what is in effect a contention that the identical parts were not involved in these sales.

(Part 2, Page 550.)

Mr. Butterfield: In most of the sales.

Trial Examiner Kolb: And since the identical parts are not involved, there is no injury to competition. Isn't that the premise of your defense?

Mr. Butterfield: There is no prima facie raising of injury to competition.

Trial Examiner Kolb: Well, if there is no—your position is there is no discrimination where the parts are not identical?

Mr. Butterfield: My contention is that the Moog Industries, the respondent, has not discriminated within the meaning of the Robinson-Patman Act.

Trial Examiner Kolb: Because the parts are not identical which were sold to competing customers?

Mr. Butterfield: Because there has been no injury. If your Honor please, I am faced with this: The Government has put in a case in which no injury has been shown and I am placed in the position where I have to negative something that the Government has not yet proved. I cannot rest, though, because I am very much afraid that the

Commission may take official notice that a mere price difference is a price discrimination as under the Morton Salt Case, and I must show what the facts are. Now, if the facts demonstrate that Moog has discriminated and is guilty of the Robinson-Patman Act, then you have helped the Government prove its case. But certainly (Part 2, Page 551) up until now no case has been shown as to injury and it is in the negativing of that injury that I first direct my attack because unless injury has been shown, unless there has been shown a price discrimination, then I have not available to me the privilege of the defenses afforded by 2-B, because 2-B applies only to price discriminations which violate 2-A.

Trial Examiner Kolb: Now we are going into what you expect to prove in the event you go ahead with your case at some later date and some later hearing, but what I am concerned with here is solely the admissibility of these particular documents—are they relevant or are they not relevant? Now, my understanding is that since they are simply to show that identical merchandise was not sold to the competing customers who are now listed in the chart, that is the purpose of that exhibit, that in my opinion is incompetent and irrelevant.

Mr. Butterfield: May I suggest, Mr. Examiner, that not by the longest stretch of my imagination can I conceive of any invoice in this period complained of being irrelevant to this proceeding. I just can't conceive of it, of an invoice reflecting a sale—it is the same as saying the sale itself is irrelevant to this proceeding. Now, Moog would not be in any difficulty with the Federal Trade Commission if it had made no sales. Now, Moog did make sales, FTC complained of the sales and Moog brings in the invoices reflecting those sales, and I cannot see how it is immaterial (Part 2, Page 552).

Trial Examiner Kolb: But you have charts that set out the sales. These charts 79-A and 67 are charts which set out the sales made by the respective companies in Birmingham, Alabama. You are not contesting, by means of these exhibits, the correctness of those figures but you are accepting those figures as being correct, since they were taken from your books, but your sole purpose for

the exhibits is to show not the incorrectness of the exhibit but to show that the items which are listed on the exhibits are not identical.

Mr. Butterfield: I am introducing these invoices to make the picture complete. These charts tell only part of the story and to the extent that they tell only part of the story, they are incorrect. I have to show the whole fact. The FTC has shown a portion of the fact.

Mr. Schrup: If the Examiner please, Mr. Butterfield keeps shifting his grounds so much and using terms that it is very difficult to see what he is driving at. If I can explain it as I see it, Mr. Butterfield offered series 1, 2 and 3 this morning; upon motion to strike by me, they were eliminated from the record. They were eliminated on the basis they purported to show the purchase of different parts from Moog by competing purchasers; the parts, however, all being embraced in the leaf spring line, including coil springs and chassis parts of Moog. Now, he has come back and he is trying to introduce a series of hundreds of invoices showing purchases by (Part 2, Page 553) three buyers in the City of Birmingham, Alabama; some of these invoices show that these buyers did not always buy identical parts and some show that they were common buyers of the same part, which is a much weaker position for him. Now, you have ruled on that. Certainly the only part—

Trial Examiner Kolb: I guess there is no reason to prolong the argument. The objections to the exhibits will be sustained (Part 2, Page 554).

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Mr. Goetz resumed the witness stand.

I have compared the charts which were prepared from original invoices on sales to Birmingham with the charts prepared by the Federal Trade Commission that were introduced into evidence as Exhibits 67 and 79-A.

Exhibit 79-A does not contain all of the customers in Birmingham, Alabama (Part 2, Page 555).

Ensley Auto Parts Company is in Birmingham, Alabama and sales were made to them, but they are not reflected in Commission's Exhibit 79-A. Sales were made to them of coil springs, chassis parts, and leaf springs during the fiscal year ending 1950.

The witness was asked to break down the classification leaf springs, coil springs and chassis parts. He stated that is a general term designed as a catchall to include everything but coil action parts and piston rings. It includes five separate, distinct classes of parts. It includes leaf springs; it includes coil springs; it includes tie rod ends; it includes shackles; and it includes king bolts.

According to Exhibit 4-Z and 4-Z-4 Enzley Auto Parts bought leaf springs. According to Exhibit 4-Z-6 they bought coil springs; they bought coil springs Exhibit 4-Z-21, Part 2, Page 556; they bought coil springs on 4-Z-22; they bought tie rods on 4-Z-2; they bought king bolts on Exhibit 4-Z-3; they bought coil action parts on Exhibit 4-W and 4-Z-9, 4-Z-10, 4-Z-11, 12, 13, 14, 15, 16, 17, 18, 19, and 20; Exhibit 4-G is leaf springs and spring parts, purchased only by Ensley Auto Parts Company, Birmingham, Alabama. That is reflected on this invoice Exhibit 5-489. Exhibit 4-T is tie rods purchased and is reflected on Exhibit 5-502 (Part 2, Page 557), and is also reflected on Exhibits 5-488 and 5-493. Those are the exhibit numbers on the original invoices. That is all of those.

The witness was then asked to turn to Respondent's Exhibit 4-Z-6 and asked if the purchase of coil springs there was reflected on Respondent's Exhibit 5-478. Coil Springs purchases are reflected on Respondent's Exhibit 5-478. I am referring to purchase by Ensley Auto Parts. They are also reflected on Exhibits 5-483, 5-494, and 5-500 (Part 2, Page 559).

The witness was then asked to turn to Respondent's Exhibit 4-Z-21, and the witness stated that the purchase of coil springs there was reflected on Exhibits 5-483, 5-500, 5-478, 5-494, 5-465, 5-486, and 5-454.

Referring to Exhibit 4-Z-22, the invoice reflecting the entry of purchase of coil springs appears on Respondent's Exhibit 5-478, and 5-486 (Part 2, Page 560) and also respondent's Exhibit 5-492.

Referring to Exhibit 4-W, the purchase of Ensley Auto Parts, Birmingham, Alabama, is reflected on Respondent's Exhibit 5-471, 476, 490, 499, and 496.

Referring to Respondent's Exhibit 4-Z-2, referring to the purchase of tie rod ends, that is, drag links, which is part of the chassis parts, that chart reflects the invoice marked as Respondent's Exhibit 5-488 and on 5-502.

Referring to Respondent's Exhibit 4-Z-3, the purchases of king-bolt kits, which is a part of chassis parts, is a classification of chassis parts (Part 2, Page 561), and the purchases on that chart reflect the invoice marked Respondent's 5-461-457-501-482 and 502.

Referring to Respondent's Exhibit 4-Z-9, the purchases on that chart reflect the invoices marked 5-476.

Referring to Respondent's Exhibit 4-Z-10, the purchases on that chart are a reflection of invoices marked Respondent's Exhibit 5-458-472-490-474 (Part 2, Page 562), as well as Respondent's Exhibit 5-463-450-451-466-468-469-491-449.

Respondent's Exhibit 5-449 are for coil actions.

Referring to Exhibit 4-Z-13, the purchases in that exhibit reflect invoices marked Respondent's 5-462-481-498-449-455-472-and 474 (Part 2, Page 565) as well as Respondent's 5-480-484-497-490-496-452-458-450-and 451.

Referring to Respondent's Exhibit 4-Z-14, the purchases shown on that exhibit are reflected in invoices marked Respondent's Exhibit 5-450-452-(Part 2, Page 566), as well as 5-458-463-475-479-497-480-496-456-449-455-472-484-490 (Part 2, Page 567).

Referring to Exhibit 4-Z-15, the purchases shown on that exhibit are reflected in the invoices marked Respondent's Exhibit 5-455-459-458-463. That is a coil action part. There are also reflected in Respondent's Exhibit 5-449-452-472-480-484 (Part 2, Page 568), as well as 490-471-475-497-450-487-and 451.

Referring to the chart or Respondent's Exhibit 4-Z-16, the purchases shown on that part are reflected on invoices marked Respondent's Exhibit 5-463-475-480-498 (Part 2, Page 569), as well as 451-449-464-490-452-458-459.

Referring to Respondent's Exhibit 4-Z-17, the purchases shown on that chart are reflected on invoices Respondent's Exhibits 5-479. That is another coil action part. 5-449-5-450 (Part 2, Page 570), as well as 5-455-459-464-471-497-475-481-484-498-453.

Referring to Respondent's Exhibit 4-Z-18, the sales on that exhibit are reflected by invoices marked Respondent's Exhibit 4-450 (Part 2, Page 571)—that is a coil action line—as well as by Respondent's Exhibit 5-451-453-455-459-476-479-481-485-491 and 497 (Part 2, Page 572).

Referring to Respondent's Exhibit 4-Z-19, the purchases shown on that chart are reflected in the invoices marked Respondent's Exhibits 5-449—those are another coil action line parts—as well as 451-455-459-460-469-466-471-477-479 485 (Part 2, Page 573).

Referring to Respondent's Exhibit 4-Z-20, the purchases on that chart are reflected in the invoices marked Respondent's Exhibit 5-449-460-466-469-477-485-498.

The purchases referred to in these various charts were purchased by Ensley Auto Parts Company (Part 2, Page 574).

Referring to Respondent's Exhibit 4-G, the invoice marked as Respondent's Exhibit 5-489 is a reflection of the invoice.

Referring to Respondent's Exhibit 4-Z-4, the invoices on which the purchases are there reflected are marked Respondent's Exhibit 5-467—that is a spring—and on Exhibit 5-470 and 495 there are other charts such as Respondent's Exhibit 4-Z-6—coil springs (Part 2, Page 575). Those purchases are reflected in invoices marked Respondent's Exhibit 5-478-483-494-500. None of those sales are reflected on charts prepared by the Federal Trade Commission in their Exhibits 67 and 79-A. I am referring to the sales on Respondent's Exhibit 4-Z-6 and on this point I am referring to Exhibit 4-Z-6 alone (Part 2, Page 576). None of those sales are reflected in FTC Exhibits 67 and 79-A.

All of the testimony that I have given in regard to these charts, this morning, has all been with reference to Ensley Auto Parts Company, and there has been no other purchaser involved in them.

Trial Examiner Kolb: As I understand it, all invoices which pertain to purchases by Ensley of leaf springs, coil springs and chassis parts, they do not appear in the Commission's Exhibit 79-A.

Counsel for Commission agreed to this statement.

The Trial Examiner inquired of the witness if Ensley was a member of a group, and the witness answered that they were not.

Trial Examiner Kolb:

Q. The exhibits also show "Purchases By The Dixie Spring Service" except in one exhibit where it states "Purchases By Cotton States on the Account of Dixie Spring." Is that a mistake? (Part 2, Page 577.)

The Witness: No, that is purchased by three concerns by Cotton States in Alabama, by Dixie Auto Parts—

Trial Examiner Kolb: Oh, then Dixie Spring Service is not a member of a group?

Witness: No.

By Respondent's Counsel:

Q. Now, Mr. Goetz, these charts and exhibits that you have prepared—these charts reflect, do they not, the fact that in many instances the largest purchasers got the smallest discount and the smallest purchasers got the "smallest" (largest) discount?

Commission's counsel objected to any questions on the charts until they had been offered and received in evidence, which objection was sustained by the Trial Examiner (Part 2, Page 578).

At this point counsel for Respondent re-offered in evidence Exhibits 4-A through 4-Z-22.

Trial Examiner Kolb: Well, to shorten this—Mr. Goetz, series 5, Respondent's Exhibits 5-1 thru 5-502, do those represent all the sales made by the Respondent to the Birmingham area?

The Witness: Yes, they do.

Trial Examiner Kolb: Covers sales to all customers in the Birmingham area?

The Witness: Yes, those are the invoices only.

Trial Examiner Kolb: On the offer of these exhibits yesterday, I refused to receive in evidence Exhibits 4-A thru 4-Z-22, and Exhibits 5-1 thru 502. On the bases of the testimony this morning, it appears that the invoices in the 5 series have shown that one customer, the Ensley Auto Parts, should have appeared on Commission's Exhibit 79-A,—and what was the other exhibit number?

Mr. Schrup: That is all, your Honor.

Trial Examiner Kolb: And consequently, it appears that that series of exhibits would be competent to show what sales were made in the Birmingham area, including the sales to Ensley Auto Parts, which was not included in the exhibit. I will accordingly receive Respondent's Exhibits 5-1 thru 5-502 in evidence.

(The papers referred to, heretofore marked for identification, Respondent's Exhibits 5-1 to 5-502, inclusive, were received in evidence) (Part 2, Page 579).

Mr. Schrup: May I ask if your Honor please, in connection with that ruling, does that extend to other exhibits other than those sales to Ensley?

Trial Examiner Kolb: I am receiving all the exhibits which Mr. Goetz has testified reflect the entire sales in the Birmingham area.

Mr. Schrup: Invoices?

Trial Examiner Kolb: Invoices only. Now, as to the tabulations, the tabulation appear to be drafting from these exhibits certain comparative data with reference to identical parts purchased by various customers. As stated yesterday, this, in my opinion, is incompetent, irrelevant and immaterial to the issues in this proceeding, so I will again refuse the admittance of Respondent's Exhibits 4-A thru 4-Z-22 (Part 2, Page 580).

October 13, 1952, at Denver, Colorado.

JOHN W. FOSTER testified on behalf of Respondent, Moog Industries as follows:

Direct Examination.

My name is John W. Foster. I am Treasurer of Foster Auto Supply Company at 550 Acoma Street, Denver, Colorado (Part 2, Page 583). I have been connected with that company twenty-eight years.

We purchased products from Moog Industries in the years 1947, 1948, and 1949. The witness was shown Commission's Exhibit Number 66, showing purchases of the Foster Auto Supply Company purporting to be in the amount of $8,085.74 for the year 1947; $713.86 for 1948; and $61.04 for the year 1949; and was asked whether those figures were approximately the amount that that company purchased during that period of time of coil action parts from Moog Industries. The witness states that he imagined the amounts were accurate; that he could check them with his check vouchers, which he did not have with him.

The witness was asked as to why the purchases for the year 1949 were about 10% of what they were in 1948; why the purchases in 1948 were less than 10% of what they were in 1947. The witness stated that the explanation for that was that Foster Company had changed to another make of coil action parts in 1948; that the company had only one coil action part manufacturer in 1947 and that then the Foster Company had the complete line of Thompson products and had changed to their coil action parts and that that accounted for the difference (Part 2, Page 584).

We are known as a distributor of automotive parts in Denver. We sell to wholesalers and also subjob some of our sales. We maintain a machine shop in our same building. We sell fleets, car dealers, independent garage men, retail outlets and sell parts at retail at a counter that we maintain at our place of business (Part 2, Page 585). We sell industrial concerns and consumer-buying groups. There is a difference in the prices we charge to these various people. We do not sell all of them at the same price. We buy direct from the manufacturer (Part 2, Page 586).

We buy at what is shown as Distributors Blue Sheet Prices. Moog furnishes no suggested selling prices. We are not bound to sell at those suggested prices. We can sell the items for whatever price we see fit. If we were selling an item purchased from Moog that has a suggested list price of one dollar, we would sell that at retail at a dollar. If a car dealer bought one of that item, and it was an emergency purchase or something like that, we would probably sell it to him for 67¢ (Part 2, Page 587). If the same item was bought by an independent garage man, we would sell it to him for 67¢. We would subjob an item like that for approximately 50¢. We would sell that item to a wagon peddler and his price would be the 50¢ price. In marking this item that we bought from Moog, we do not employ lower prices for the consumer. If we were selling direct to the consumer, there are circumstances in which we would vary that price. For instance, if a policeman on the beat would come in and want to buy that item for his own car, we would perhaps sell it to him for 75 or 80¢ (Part 2, Page 588). If the person who came in was an employe of the light company or the gas company, or the telephone company, we would give him a different price than a consumer that came off the street. We would give him a price of about 75¢. If an electric light company, an industrial concern, or a manufacturing concern bought a quantity of that item for their own use, we would make them a price of 60¢. If we were selling that item to a purchasing agent for a consumers buying group, if they were stocking the item, it would carry a 60¢ price. A subjobber or a wholesaler would get a 50¢ price. We sell to wagon peddlers and they pay 50¢. If wagon peddler bought on a voluntary basis we would probably sell it for 45¢. We vary the prices according to the volume that is purchased and according to whom the purchaser is (Part 2, Page 589).

Foster Auto Supply started in business in 1915. At that time there were other automotive distributors in Denver. One of them was Hendrie & Bolthoff. They have been in business since 1886. We are about 10% of their size. When the Foster Auto Supply Company started in business in 1915, there was a practice of rebates at that

time. When I first came with the company our full retail business was approximately 10% (Part 2; Page 590). When I came with the company in 1928 or 1929, there was very little redistribution from Foster Auto Supply. The growth record of our company has been fairly steady through the years. We had about 15% of re-distribution in the middle 30's. At the beginning of World War 2, we had 35% of redistribution, and since the war it is running over 55% redistribution (Part 2, Page 591).

The witness was referred to Commission's Exhibit 66, which, according to the exhibit, Foster Auto Supply was the largest purchaser of coil action parts from Moog Industries in the year 1947, and the exhibit purported to show that Foster received about 9% volume rebate as compared with 7½% volume rebate for Steckel and B. K. Sweeney Electric, and the witness was asked whether he was familiar with the B. K. Sweeney Electric. The witness stated he was and that that company was about five times larger than Foster Auto Supply.

The witness' attention was again called to Commission's Exhibit Number 66, and referred to the fact that in 1948 it showed coil action sales by Moog Industries to Foster Auto Supply, Steckel Auto Supply and B. K. Sweeney, and the witness was asked if that fairly represented the number of wholesalers or distributors dealing in coil action sales in Denver for that period. The witness stated that it did not; that there were about 15 concerns engaged in selling in that period.

Q. In the year 1948, it shows you as the smallest purchaser of coil action parts and that B. K. Sweeney was the largest purchaser from this particular company, Moog Industries. No, Hendrie and Bolthoff was the largest purchaser, and this Exhibit Number 66 purports to show that Hendrie & Bolthoff was the largest purchaser, and the Exhibit Number 66 purports to show that Hendrie & Bolthoff got 8% volume rebate, the same as B. K. Sweeney Electric, and Steckel Auto got 7½%, while you received no volume rebate for that year. May I ask you if that list of automotive parts distributors fairly represents the number distributing coil action parts?

A. No.

Mr. Schrup: I have an objection to the question. What do you mean by fairly representative? This list only purports to be representative of buyers. I don't know what you mean by the word "fairly". The Exhibit is very fair on its face. It is all it is supposed to represent. There are other buyers of coil action parts in the City. I think you had better rephrase your question.

Examiner Kolb: The Exhibit appears to be a group of jobbers, not a group of buyers as far as the industry is concerned.

Mr. Schrup: Maybe I misstated myself. I meant jobbers.

Examiner Kolb: I think it is understood that this does not purport to show all the jobbers in Denver.

By Mr. Butterfield: For the year 1949 the Foster Auto Supply also appears—this Exhibit purports to cover three years purchasers, and the Steckel Auto Supply and B. K. Sweeney Electric and Western Spring Service Company. Now, the Western Spring Service Company received no volume rebate in that year on $967.00 in sales while Sweeney and Steckel received 5 percent and you received 18 percent on $60.00 worth of sales.

Mr. Schrup: 17 per cent.

Mr. Butterfield: 17 per cent. What did I say?

Mr. Schrup: 18 percent.

Mr. Butterfield: I was reading the last column.

Q. Do you know when the Western Spring Service started in business?

A. I don't know the exact year, but it was 10 or 15 years before.

Q. They were in business in '47 and '48?

A. Yes.

Q. And Hendrie and Bolthoff was still in business in '49?

A. Yes.

Q. And it is still in business today, is it not?

A. Yes.

Q. Will you state how big Hendrie and Bolthoff is compared with you today?

A. They are anyway ten times larger than we are.

The $8,000.00 worth of coil action parts that we bought from Moog, in 1947, did not represent all of our purchases of coil action parts for that year. It represented about 80% of our purchases. In 1948 the $713.86 coil action parts that we bought from Moog did not represent our total purchases of coil action parts for that year. It represents about 15% of such purchases, and in 1949 the $61.04 worth of coil action parts bought represented about 1% of our purchases of such parts (Part 2, Page 595). The explanation of that is that in 1948 the Thompson Products people came out with a knee action part which they didn't have previous to that time, and because of their overall line, we bought almost all of our coil action parts from them. At the present time we are buying about 50% of our purchases of coil action parts from Moog Industries. The witness was asked whether his failure to receive a volume rebate on purchases of coil action parts from Moog in 1948 had any effect on his decision to buy or not to buy Moog parts at that time. This was objected to, and the objection was sustained. In 1948, so far as I know, we did not lose any business in our distribution of Moog parts to Hendrie and Bolthoff or to B. K. Sweeney (Part 2, Page 596).

I am fairly familiar with the sales of automotive parts, particularly coil action parts and coil action springs, in this Denver area (Part 2, Page 597).

I did not include car dealers in mentioning the 15 distributors that were in business here distributing coil action parts and coil action springs in 1947, 1948, and 1949. The car dealer sells coil action parts and coil springs to the general public. Some of the car dealers purchase these parts at about the same price that other distributors purchase theirs (Part 2, Page 598).

We are in competition with the car dealer; we sell the same customers that the car dealer sells to; the garages and that sort of trade. The car dealer also sells at retail direct to the consumer, and so do we. We sell to the car dealer and we buy some coil action parts from the car dealer (Part 2, Page 599). We purchase coil action parts from a car dealer, and they usually sell us on what they

call "dealers discount", and we sell them coil action parts for their cars at a dealer's discount also.

Q. Is there a difference in price when you sell to them or when you buy from them, according to the volume that you buy or sell?

A. When we sell to them, there is a difference in price according to their volume. We would not normally buy any volume from them.

Taking the car dealers as a whole, we sold to them in considerable volume. We sell Moog Products to the car dealer in considerable volume. I could not tell you what percentage of our sales of coil action parts, purchased from Moog, that we sell to the car dealer. I do not know. I can answer it this way: Our car dealer business will constitute about 28% of our business, which would probably cover about 28% of Moog coil action parts to the car dealers (Part 2, Page 600). In most cases the car dealer re-sells those items to the same class of customers that we sell.

Cross Examination.

The Foster Auto Supply Company carries 85 or 90 lines for re-sale. Our volume of sales for 1950 and 1951 totalled overall about a million dollars annually. About 55% of those sales are redistribution sales, re-selling to jobbers (Part 2, Page 601). About 35% of our annual volume would be to dealers and large fleets and that sort of thing, and the other 10% would be to industrial companies, individuals and that sort of thing. As to the percentage of our over-the-counter sales, they are all thrown together, but actually it figures about 50% of our business. Our trade area is the State of Colorado, with the exception of Durango, the southern part of Wyoming, and the western part of Kansas. We travel 10 salesmen.

As to selling something to consumer-buying groups, I mean by that that there are several of them which we do not recognize as dealers, but we do sell the individuals in the group. For instance, the Public Service Company has a group, the Lowry Field employes, the Federal employes have groups. We cannot recognize them unless we jeop-

ardize our dealer business. But there are several of the people that belong to these groups that do come in and buy as individuals at a discount (Part 2, Page 602). In purchasing Moog products for re-sale, I do not have our catalogue or price list with me. We buy on what is known as a distributor's cost. As to the discount we get on most of the Moog items, it figures about 60%, and then on redistribution, we would have to buy it better than 60% to re-sell it.

Q. Do you buy all of your Moog products, no matter what the re-sale, at a certain price, at a certain discount?

A. No. It is all figured on a net price.

Q. That net price is all the same for all products you buy from Moog?

A. I don't understand your question.

Q. Is there any occasion when you pay Moog a different price on the same item you buy from them?

A. No.

I have previously stated that our purchases from Moog had dropped off in 1949 by reason of switching our business to the Thompson Products line, and that of late years we have turned some of that business back to Moog (Part 2, Page 603). The reason for that was, the biggest problem we had with Moog in the years 1948 and 1949 was their cataloging, our men were unable to read their catalogs. In '50 I believe they came out with a catalog that we were able to read, and because of that and the product was good, our men liked to sell it, they have taken it back in the line.

The Foster Auto Supply Company does not belong to any buying group, as a buying group. We are members of what we call the Mid-West Warehouse Distributors. Its primary function is not as a buying group. It is an interchange. It functions as an interchange among members. We do buy some products on buying forms supplied by Mid-West The transaction is handled on our purchase orders sent to the manufacturer on the Mid-West letterhead. The merchandise is shipped to us and billed to Mid-West. We find it economical to do it that way with many small lines because we have one check to make out instead of fifteen or eighteen, or whatever number there are (Part 2, Page 604).

We joined that group late in 1949. I believe it was incorporated the latter part of 1950. In 1949 we were a customer of Thompson Products. In 1949 we were buying all of our coil action line from Thompson Products, except a few emergency pick-ups from Moog at that time. In 1950 we did go back into the Moog set-up because of their catalogfng and it runs about 50% now from Moog (Part 2, Page 605). We buy from Moog on purchase forms through the Mid-West Group.

In issuing an order from our firm to Moog, we issue it on a purchase order form at this time entitled "Mid-West Warehouse Distributors, Inc." This order is sent direct to the Moog factory and the order is shipped direct to us. We pay Mid-West Warehouse Distributors for that merchandise monthly. We do not deduct anything from the purchase price when we pay them. As a result of our purchase transactions with Moog, Mid-West remits to us a rebate if the volume is into the volume rebate bracket (Part 2, Page 606). On Commission's Exhibit 66 our purchases apparently in 1949 were $61.04. On that particular item, whatever it was, according to the chart that was subject to 17% volume rebate.

Q. Now I notice that in 1947 your purchases from Moog amounted to Eight Thousand and some odd dollars and you received 9%. That accounts for a difference of 8% on your buying price. Now, do you prefer to buy at a lower discount rate?

A. You mean do we prefer to pay more money or not?

Q. That is the question.

A. No.

Q. I understand then that you prefer to buy always at a lesser price, if possible?

A. Yes (Part 2, Page 607).

Re-Direct Examination.

Q. You say that you get about 60% on Moog, but you have to get better than that for redistribution. By that you meant that in order to re-distribute you have to get better than 60%? How do you get that better than 60% for re-distribution?

A. On Moog's volume rebate we can't afford to re-distribute because of the volume rebate that we tend to get into, and it makes it profitable to what is it, 17 percent as it shows on the exhibit.

Q. This buying group that you speak of, is that a device that is in general use by the small distributor in order to place himself in a position to re-distribute?

A. It is necessary to be competitive with the larger distributors to sell the same type of account.

Otherwise, there would be no redistribution business. At the present time we are purchasing about 50% of our coil action parts from Moog and 50% from Thompson Products. Thompson Products gives us the same kind of a redistribution rebate.

Q. The volume rebate practice is the same in both companies? (Part 2, Page 608.)

Mr. Schrup: We have an objection here at this point. I think we might as well get it clear on the record. Mr. Butterfield is seeking to prove that prices of competitors are comparable which he has a right to do, but he must do it within the interpretation of the Act as laid down in the Standard Oil decision. I want to reserve my right to object until he has completed his examination of these various witnesses, and then, if it is not connected up in the proper way, I shall make a motion to strike. At this time it cannot be determined whether it is going to be connected up or not.

Examiner Kolb: Are you objecting to the last question?

Mr. Schrup: Yes, I am, sir. I am going to make a continuing objection to all the evidence on competitors prices until he closes his case on that, and then, if he hasn't connected it up in the proper way, I shall make a motion to strike at that time.

Examiner Kolb: Read that last question.

(The last question was read by the reporter.)

Examiner Kolb: The witness may answer.

A. The volume rebate is the same percentage, but it is worked out a different way (Part 2, Page 609).

EDWARD LIVONIUS testified on behalf of Respondent Moog as follows:

Direct Examination.

My name is Edward Livonius. I am an officer and General Manager of Western Spring Service Company at 125 West 12th Street, Denver, Colorado. I have been in the automotive business about ten years. I first came with that company in 1943. We are a distributor in the Denver area, of automotive parts (Part 2, Page 610). We re-sell these parts that we purchase from manufacturers to wholesalers and subjobbers. We maintain a service shop in connection with this business. We also sell these items over the counter to various classes of customers.

We purchased from Moog Industries for the year 1949 approximately $967.00 worth of coil action parts. We received no volume discount on those purchases at that time. In 1947, and 1948 we were dealing to some extent in coil action parts and were purchasing at that time mostly from Thompson Products. At this time we are not purchasing coil action parts from Moog (Part 2, Page 611). Some of the coil action parts that we purchased from Moog in 1949 we sold at retail to consumers, some of them we sold to fleets and independent garage men, and I presume we sold some to wagon peddlers.

Q. Did you give them a volume discount according to the volume that they purchased on the sales of those coil action parts?

A. No, but we would have sold them at a lower discount if they were classified, depending upon the classification and the type of customer.

Q. Do you, where you re-distribute, do you give volume discount to your jobbers, subjobbers?

A. Not volume discounts.

We do not give them any discount based on quantity of purchases that they make of the particular item. We have all the jobbers set up, if they are qualified to be a jobber, but we feel they have to be a certain type of jobber or do a certain amount of business, to be qualified as a jobber (Part 2, Page 612).

In 1949, an item that we purchased for around 40¢, the list price of that would have been probably around a dollar.

Q. When you sold that retail to the customer, did you charge him full list price, or sometimes a list and sometimes you gave him a special price, depending upon who he was connected with?

A. Yes, sir. If he were connected with someone that could give us a purchase order.

In 1949, 70% of our coil action parts were re-distributed. We are buying our coil action parts now from Hershey Metal Products.

In connection with our distribution, we also engage in manufacturing a line of leaf springs called "Western Springs" (Part 2, Page 613).

We manufacture the same kind of springs, for the same purposes, for the same automobiles, for instance that Moog Industries sell. I have not kept current recently with the Moog pricing of leaf springs in this area, but I am thoroughly familiar with it. We do not give a volume discount in the sale of our leaf springs.

Q. In the sale of leaf springs in the Denver area by Moog, have Moog's pricing practices in any way injured you competitively?

A. No.

As to our approximate size in distribution in relation to Hendrie-Bolthoff, they are a much larger concern. I don't know what their volume would be as compared to ours. We sell them some merchandise. Western Springs Service has been in business since 1933 (Part 2, Page 614). Hendrie & Bolthoff went in business in eighteen hundred something.

Q. In 48, the year 1948, did you lose any business to Hendrie & Bolthoff that you know of?

A. Well, they had done a lot of business. We sold them a lot of merchandise in '48.

They sell to the same class of customers that we sell. We haven't been bothered by Hendrie & Bolthoff cutting into our business. We consider them a good customer.

As to the comparative size of Western Springs Service and its distribution activities to B. K. Sweeney Electric Company in the lines that we handle, we would be far larger overall. They deal in lots of products that we do not deal in. In the year 1949 we were selling to the same class of customers as B. K. Sweeney. That year we sold them some but very little (Part 2, Page 615).

In the year 1949, both our company and B. K. Sweeney purchased coil action parts from Moog Industries, and we both resold these to the same class of customers. To the best of our knowledge, in 1949 we successfully met the competition of B. K. Sweeney in the sale of coil action parts (Part 2, Page 616).

We are able to compete today with B. K. Sweeney.

Q. Have the pricing practices of Moog in the leaf spring line, or in this coil action sales line, have either or both of them injured you competitively necessarily?

A. No.

I have been in this business for ten years. We sell to car dealers and the car dealers in turn sell in competition with us. Undoubtedly, we sold coil action parts of Moog Industries to car dealers in 1949. We were selling car dealers all the time (Part 2, Page 617).

As to what percentage of our coil action parts sales went to car dealers, that is a little hard to say, without getting figures especially on one particular item when we sell so many items, but the figures are available. There is no particular item in coil action parts. By that I mean all of our overall sales I could give you a better idea of what they were, but during this one year, this $900.00 that we bought from Moog, it would be hard to say what percentage of that went to car dealers. It probably would have been in the neighborhood of, roughly, 40%, maybe 30%. That is about the same percentage that we sell to car dealers today.

Cross Examination.

Western Spring Service started buying directly from Moog, I believe, in 1949. We are not still buying from Moog. As to whether 1949 was the only year we bought

from them, there may have been a few other small purchases (Part 2, Page 618). From the Commission's Exhibit 66, our purchases amounted to, roughly, $1,000.00. That was not all of the coil action parts we purchased during that year. As to what percentage that would be of our total purchases for that year, that would be hard to answer without looking up the figures. It would probably be more than half during that year.

Western Spring Company is also a manufacturer of leaf springs. As to our sales of that item for the year 1949, I do not have the figures available; I would have to look it up. That is the only product we manufacture (Part 2, Page 619).

Q. Well, let's take the year 1950, would you give us an idea for 1950 what percentage of your sales were leaf springs manufactured by you?

A. Not manufactured by us. We don't break it down in our sales at the selling price, what part of it we manufacture and what part of it we sold, for excise tax purposes.

We buy a lot of leaf springs besides those we manufacture. We don't manufacture all the leaf springs we sell. We manufacture about 10 or 15% of the leaf springs we sell. Our annual sales in leaf springs for the year 1950 were about a quarter of a million dollars, and of that about 10 or 15% we manufacture ourselves. We do not sell on volume discount. Our list price on leaf springs is very comparable to Moog's list price. Some items are probably a little less and some a little more. It is competitive (Part 2, Page 620).

Q. I think you stated that you were not injured by the pricing practices of Moog. By that you have reference to the fact that all the Moog products are sold at suggested resale prices?

A. I don't know what Moog sells the rest of their merchandise for. I presume they offer it the same as it is offered to us for.

Q. When you are talking about the fact you are not injured by the pricing practice of Moog, you are talking about your purchases of Moog products?

A. Yes.

Q. Is that correct?

A. Yes.

Q. I think, if you refer to the chart in Commission's Exhibit 66, in the year 1949 you bought approximately a thousand dollars worth and you received no discount. Would you have preferred to have received a discount?

A. Well, we always like to buy at the cheapest price we can, but we were not redistributing, there was no redistribution program as far as we were concerned to sell to.

Q. I am not worried how you are reselling. I am talking about your buying. Are you interested in buying your merchandise at the cheapest price possible? (Part 2, Page 621.)

A. Not always. We can buy lots of things cheaper than we buy.

Q. I mean the same quality.

A. Yes.

Q. Will you tell us why?

A. There is more profit.

Re-Direct Examination.

If we sell an item that we purchase at 40¢ for $1.00, our mark-up would be about 60¢. If we sold it for 50¢, our mark-up would be 5%, 10¢ on a 40¢ purchase would be a 5% mark-up.

As to whether it costs more to sell at list than it does to sell at redistribution, it would cost more to sell a dollar's worth. It is true that the better price we receive enables us to sell a higher percentage for redistribution (Part 2, Page 622).

Q. Is the profit in your business made mostly from redistribution or from direct distribution?

A. On coil action parts and leaf springs. yes.

We purchase all of our coil action parts at the same price. Maybe I should modify that a little. We may pick up something that we are out of from some other concern here, locally. Our present suppliers do not have any volume requirements. We have to maintain a certain volume

or they would give the deal to someone else (Part 2, Page 623). On our coil action parts we get as good or a better deal from our present suppliers than we would receive from Moog under its present pricing practice.

Re-Cross Examination.

What I meant by deal was the price at which we buy the product which we sell. We buy that product from Hershey Metal Products. Their price basis is a list or a certain percentage of discount or a list price. It varies. Our purchases in 1950 were about $30,000.00 (Part 2, Page 624). We receive no volume discount. We have a flat discount that is set up as a warehouse fee, and we buy it all at that price, but we must do an adequate volume of business to be classified as a warehouse. This is the way it works: They offer us a price. We buy at that price. They furnish the sheets that they sell all their warehouses throughout the United States at. We buy it at that price, which is a price so that we can re-sell it to other jobbers and dealers. Their business price is neither higher nor lower than Moog Industries. It is very comparable. I would not know this, to be exact, but there would be a very very hair's difference, if any. We prefer Hershey Products over Moog Products. That is the reason we have them, not for quality, but there are lots of other reasons why we prefer to buy them. One reason is we are the warehouse for them instead of having another warehouse in our town to compete with us (Part 2, Page 625).

We sell Geary-Hershey coil action parts. We can talk up the name and it is our business if we can sell the customer. We commenced buying from Hershey in '49 or '50. Previous to that we bought from Moog and from local suppliers and from Thompson Products. I don't believe in 1948 we bought directly from Moog. We were not distributing any coil action parts at that time. It has only been in recent years we have gone into redistributing coil action parts. We re-distribute about 80 or 85% of the products we buy from Hershey. I mean by that we sell these to other jobbers and dealers who are selling them. In other words, they re-distribute them. The balance of

15% is sold to various fleet accounts and a little to the consumer trade; the automobile owner (Part 2, Page 626).

I have previously testified that I believe that 1949 was the last year we purchased from Moog, and according to Commission's Exhibit 66, my purchases were approximately $1,000.00, and that that probably comprised about 50% of our entire purchases of coil action parts for that year. I believe we started to purchase from Hershey in 1950. They set us up as a warehouse distributor of their product at that time. As to how much we purchased in 1950, I would not know offhand for that year or 1951. It was around $30,000.00 and probably the year before somewhat lower, because we had been growing in that field (Part 2, Page 627). Our purchases in 1949 were $2,000.00, and jumped to what amount I do not know offhand in 1950, but in 1951 it was almost $30,000.00, and was growing during that period. I have available our distributor franchise with Hershey and their price list. I do not have it with me. It is at the office. You can see it during the Noon recess. All it would be would be a price sheet. There is no signed franchise (Part 2, Page 628).

I have the price sheets from Hershey with me. We have no written franchise with them. We are just their warehouse. Answering your question as to whether we have any sort of agreement with them at all, we just buy from them what they sell and we buy at that price because we are a warehouse. There are undoubtedly letters in our file offering us a proposition and our acceptance. Most of this was done verbally. We don't make our customers sign a franchise to sell them. I do not know whether Hershey has written franchises. If they do, then we have one (Part 2, Page 629).

The Noon Recess then intervened.

Mr. Livonius resumed the witness stand.

Re-Cross Examination—Continued.

To recapitulate, we started purchasing from Hershey Metal Products of Derby, Connecticut, the latter part of '49, and they classified us as a warehouse distributor. That entitles us to buy off their blue list at a specified discount.

We buy off of the blue sheet list less 20% regardless of the volume we purchase on any given order or given period of time (Part 2, Page 631). No matter to whom we re-sell this merchandise, even if we sell as a jobber we still get the 20% discount. Even when we sell at retail, we get our 20% warehouse distributor discount. In addition to coil action springs, we purchase king pin parts from them. I don't know what percentage they amount to. We carry them on our books in one classification. They are all chassis parts. We do not entirely follow the suggested re-sale prices that are quoted by Hershey Meta Products.

We travel six salesmen who cover, Colorado, Wyoming, Northern New Mexico, Western Nebraska, the Black Hills of South Dakota, and Western Kansas. They call on jobbing accounts and automobile dealers. We call on the independent garage man locally, but not in the territory (Part 2, Page 632). As to mail order sales, all of the business that we get from the territory they either telephone or mail an order in. It has to come to us from the territory by some form of communication. We do not publish a mail order catalog. We do not belong to any buying group.

Re-Direct Examination.

In looking for a memorandum on Hershey, I ran across a Moog distributor agreement, but we are not buying from Moog at the present time, even though we signed the contract. As to how we treat these so-called franchise agreements that we sign with the manufacturer, if we desire to buy from them and they are willing to sell us according to the agreement, we buy from them. If we prefer to buy from someone else, we just don't use them. We feel that we have the right to buy from anybody we want to buy from that wants to sell us (Part 2, Page 632), and we have the right to sell whomsoever we want to sell to. As to the consumer, we sell him at whatever price we care to sell him, even though we have bought the goods all at the same time at 20% off the face of the invoice on blue sheet prices. The supplier does not restrict us on sales to consumers. In fact, we sell direct to consumers.

At this point Respondent's Exhibits 6-A and 6-B, 6-C, and 6-D were marked for identification.

At this point Respondent's Exhibit 7-A, 7-B, 7-C and 7-D were marked for identification.

The witness was shown Respondent's Exhibit 6-A and on it part number 225, Geary-Hershey jobber price 66¢, list price $1.49, and asked what that item was. The witness answered that it was an upper, outer pivot pin bushing for a Chevrolet (Part 2, Page 634). Moog's Number K-25, 65¢ distributor's net cost is the same item as that part number 225.

Mr. Butterfield: At this time, if your Honor please, I would like to offer in evidence Respondent's Exhibits 6-A to 6-D, inclusive, Geary-Hershey prices to the distributor and the suggested re-sale sheets supplementary thereto and the current price sheets of Moog Industries being the distributor's net cost and suggested re-sale price list supplemental thereto.

Examiner Kolb: That is Exhibits 7-A to 7-D, inclusive?

Mr. Butterfield: Yes.

Mr. Schrup: We have no objection to Respondent's Exhibits 7-A through D, being the Moog prices. We do have an objection as previously made to Respondent's Exhibits 6-A through 6-D. We will reserve our objections and make them in (Part 2, Page 635) in full at the close of the presentation of all of the testimony of this nature. Apparently, this is being offered as a defense under Section 2 (b) of the Act.

Examiner Kolb: Nothing has been said about the basis on which it has been offered.

Mr. Schrup: I can see no other reason for offering exhibits of competitors.

Examiner Kolb: Do you want to reserve the right to object at a later time?

Mr. Schrup: What is the purpose of the offer, Mr. Butterfield?

Mr. Butterfield: It is a chain of questions that were asked here on cross-examination, and this material was brought in at your request, and the purpose of the offer is to clarify the questions that were asked on cross-examination and re-direct.

Mr. Schrup: If I wanted to offer them as exhibits, I would offer them. I had no intention of offering them as exhibits. If they are offered by you for any purpose relative to a defense under Section 2 (b), I make that objection on that basis.

Examiner Kolb: Section 2(b) has not been mentioned in this proceeding. There is no defense under 2 (b) they are being offered unless you are insisting they are being defended upon that basis. I don't know. The documents will be received in evidence as Respondent's Exhibits 6-A to 6-D and 7-A to 7-D, inclusive.

(Respondent's Exhibits 6-A to 6-D and 7-A to 7-D, inclusive, for identification, were received in evidence, Part 2, Page 636.)

As a matter of practice, we make a practice of following the suggested re-sale prices of the goods we re-sell. We find it advantageous as a reseller of automotive parts to be a so-called warehouse distributor.

Re-Direct Examination.

As long as we abide by O. P. S. regulations we may want to sell that commodity at a different price than the re-sale price.

(At this point Respondent's Exhibits 8 and 9 were marked for identification.) (Part 2, Page 637.)

Mr Butterfield: If your Honor please, I had marked for identification Exhibit 8, the Geary-Hershey Replacement Parts Catalog D-6, and Exhibit 9, the current Moog Catalog, which includes chassis replacement parts but also has leaf springs and the other complete Moog line. I offer them for they are the catalogs with which this transference can be made between Exhibits 6 and 7.

Mr. Schrup: No objection to 9. Continuing objection to 8.

Examiner Kolb: What is the purpose of these Exhibits being offered?

Mr. Butterfield: The purpose of the exhibits is to show the pricing practices of the Geary-Hershey Company, one of the competitors of Moog, in the primary line and to show the method of distribution by one of Moog's

former customers who had bought Moog in 1949 and is now buying Geary-Hershey going to the question of injury to competition under 2 (a).

Examiner Kolb: How does that prove injury to competition?

Mr. Butterfield: This prove injury?

Examiner Kolb: Yes.

Mr. Butterfield: It is not to prove injury to competition.

Examiner Kolb: What is the purpose of it then? You say you want to show injury to competition.

Mr. Butterfield: It goes to the question of injury to competition by showing what the competitive picture is (Part 2, Page 638) and what is going on in the Denver area in which the Government has introduced Exhibit 66, an exhibit based on the Denver area showing Moog's activities in the Denver area about which the Government is complaining.

Examiner Kolb: Do you want to show that Moog is selling less than Geary-Hershey?

Mr. Butterfield: No. I am showing that Geary-Hershey is an account which is selling on the same basis that Moog is selling.

Examiner Kolb: Well, your witness has testified that in the overall picture of all the coil action parts that it would be about the same whether he bought from Moog or whether he bought from Hershey.

Mr. Butterfield: That's correct.

Examiner Kolb: It looks like even putting in Exhibits 6-A and 7-A tends to confuse the issue, because you are only taking one particular item to show that that is sold at approximately the same price when the witness says some are sold more and some are sold less and in the overall average they would be about the same. That is correct, isn't it, Mr. Witness?

The Witness: Yes.

Mr. Butterfield: Exhibits 6-A to D and Exhibits 7-A to D are complete pricing schedules of coil action parts of Geary-Hershey and Moog Industries (Part 2, Page 639).

Examiner Kolb: You are offering those to show that they both sell at about the same price?

Mr. Butterfield: That's correct.

Examiner Kolb: Well, I think that simply confuses it to put those price lists in, because there is no way of determining which applies to which.

Mr. Butterfield: That is the purpose of Exhibits 8 and 9, because in Exhibits 8 and 9 is a complete photograph of each part and exactly what they are used for, and the photographs are in here, and by taking a page of Exhibit 8 and a page of Exhibit 9 the photographs describe exactly what they are on dimensions. The dimensions and everything are in here and the purpose for which they are used and what car they go on and what model car it goes on, and the pictures in the two catalogs are identical.

Examiner Kolb: The witness has testified that the prices are approximately the same. Now, are you offering that to substantiate this witness' testimony or to contradict it?

Mr. Butterfield: No. He testified from these two Exhibits.

Examiner Kolb: That is only one item.

Mr. Butterfield: Yes. I can take each item on here.

Examiner Kolb: What do you expect to show in the last analysis on it? (Part 2, Page 640.)

Mr. Butterfield: In the last analysis that any competitor, that any jobber or wholesaler or distributor in the Denver area that is not satisfied with Moog's prices, he can get the same prices from Geary-Hershey or even better.

Examiner Kolb: The witness testified that he has the exclusive for Hershey here in the Denver area.

Mr. Butterfield: That's right.

Examiner Kolb: Then, he could not get the same thing from Geary-Hershey, could he? I don t want a lot of useless stuff for me to read that I can't figure out, nor do I want to pass a lot of useless stuff to the Commission for them to read. If you say all that this will prove is that the prices were substantially the same, the witness has

testified to that. He says some are higher and some are lower, but on the average the parts he would buy are about the same.

Mr. Butterfield: These aren't the only two companies that are selling in the Denver area. There are other companies selling in here too.

Examiner Kolb: As between Moog and Geary-Hershey there is no chance of buying from Geary Hershey, because this man has the exclusive for this territory.

The Witness: Other jobbers can buy.

Examiner Kolb: Through your warehouse?

The Witness: Yes.

Examiner Kolb: But not on the regular deal that you (Part 2, Page 641) have with Hershey.

The Witness: No, but it still would be comparable to what they bought from Moog.

By Mr. Butterfield:

Q. Anyone buying on the blue sheet from Moog can buy on the blue sheet from Geary-Hershey?

A. Yes, and they are comparable.

Examiner Kolb: But would not receive the discount that you receive as warehouseman?

The Witness: But the Moog blue sheet doesn't have any discount either. In other words, they would be buying at that blue sheet.

Examiner Kolb: Any further objection?

Mr. Schrup: None other than what we have stated. We are waiving any authentication of documents or anything of that nature.

Examiner Kolb: Well, they will be received in evidence as Respondent's Exhibits 8 and 9.

(Respondent's Exhibits 8 and 9 for identification received in evidence).

By Mr. Butterfield:

Q. You testified that you sold, say, for instance, a jobber, a subjobber of yours. When you sell on this blue sheet, Exhibit 6-A or Exhibit 7-A, if you are buying Moog, a jobber whose customer refuses to deal with that jobber,

is there any (Part 2, Page 642) way he can get it from you direct?

A. Yes.

We sell it to him at the same price that our jobber would sell it to him. That is an ordinary practice and prevails throughout the industry. We give assistance to our jobbers with these customers. If we set up a jobber we will say at Durango, and our salesman calls on the car dealer and advises the car dealer that the stock is available through our jobber in Durango, he can go to the jobber, but if he doesn't like the jobber he can send the order to us at the same price that the jobber there would sell to him. But the jobber is there to maintain the stock and to adequately serve him. We can promote the customers for the jobber but we cannot force him to buy from that jobber. We will sell to him at the same price that our jobber would sell to him (Part 2, Page 643). We sell to one of our jobber's customers, whatever class of trade it might be, at the same price that the jobber would sell to him and make his normal margin of profit.

Re-Cross Examination.

In this re-sale to the customer of our jobber, we buy that merchandise at the net price of a warehouse distributor and that is a lower price than the price for which we re-sell that merchandise to jobbers.

RUSSELL E. FARRIS testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Russell E. Farris and my business is known as Empire Spring and Shock Absorber Service, Inc. (Part 2, Page 644), I am President of the company. I buy coil action parts and leaf springs from Moog. Our business was started seven or eight years ago when I came out of the Service. When we started business I was re-building shock absorbers. About three years afterwards I went into the re-distribution of automotive parts. About a year and

a half ago we went into the manufacture of leaf springs. Before we began manufacturing leaf springs ourselves, I bought them from Burton Spring Corporation, Tuthill, and from Western Spring, locally (Part 2, Page 645). Western Spring is in Denver—that is Mr. Livonius' company. Tuthill is located in Chicago; and Burton Spring is in Chicago. We began the distribution of coil action parts approximately three years ago. We first began purchasing them from Regal Tool and Manufacturing Company, Newark, New Jersey. We have a choice of buying coil action parts from either Moog or Regal Tool and Manufacturing Company. We got the better deal from Regal (Part 2, Page 646).

Q. What sort of a proposition does Regal Tool and Manufacturing Company offer? (Part 2, Page 646.)

Mr. Schrup: I have the same objection I have had heretofore to those price lists, catalogs, and so forth of competitors of Moog.

(The question was read by the reporter as follows: "What sort of a proposition does Regal Tool and Manufacturing Company offer?")

Mr. Butterfield: I want to finish my question.

Q. Offer you in coil action parts?

Examiner Kolb: What is the purpose of that?

Mr. Butterfield: The purpose is to show the negation of injury to competition by demonstrating the facility with which a distributor can secure the same product from other sources.

Examiner Kolb: Well, the fact that a distributor can sell and procure the same product from either one or another manufacturer what bearing does that have on the selling at different prices by the one manufacturer?

Mr. Butterfield: The Moog Industries in Denver is selling at the same price to everybody on this coil action kit on Exhibit 7-A, and Regal Manufacturing Company is offering and I propose to show by this witness that Regal Manufacturing is offering a better price and what the form of that price takes. Moog gives a volume discount off of this coil action list price as shown in the exhibits already in evidence.

Examiner Kolb: As I understand your statement, Mr. (Part 2, Page 647) Butterfield, assuming for the purpose of argument at this time that a price discrimination had been shown upon the part of Moog Industries, you would then attempt to defend that on the basis, while there was a price discrimination, the customer would be able to buy his stuff some place else and it would not make any difference.

Mr. Butterfield: That is not my position.

Examiner Kolb: I would like to find out your position.

Mr. Butterfield: My position is this: that the Government has filed a complaint against Moog Industries, Inc. for price discrimination. Now, the Government has put in what it considers to be the case demonstrating what they consider demonstrates price discrimination on Moog's part, and the purpose of my defense is to show that no such price discrimination as contended by the attorneys for the Federal Trade Commission does, in fact, exist in these areas. Now, over my objection at the time there was introduced in evidence Exhibit No. 66, Government's Exhibit No. 66, and no further testimony was taken in regard to that exhibit and no hearings were held in Denver, and none of the customers of Moog that are listed on that exhibit were examined, and since the Government did not examine those witnesses and since the Government has felt content to rest with the mere showing of a price difference. I am charged I believe with the duty of (Part 2, Page 648) showing that the price difference which is attempted to be shown on that sheet is not price discrimination which the Government contends. If the Government contends that this showing of 66 is price discrimination, then I think that I can do no more than to show what the facts actually are as they exist so that the Commission may have before it not only this Exhibit 66 but the operation of the Moog pricing practices in the area purported to be covered by the exhibit.

Examiner Kolb: For example, on 66 and during the year 1949 there are four distributors or jobbers listed—call them jobbers—jobbers listed. One receives 17 percent discount, two others receive 5-percent discount, and one receives no discount. Now, as I understand, and I

assume the Commission contends that that indicates a price discrimination as between those separate customers, —now, take, for example, one of those, say, who receives 5-percent discount as compared to one who receives a 17-percent discount, as I understand your statement, you are now saying that while it may be true that this man receives a 5-percent discount in discriminating by Moog, to that extent he can go to some other manufacturer, he can buy from Moog at the higher discount. Is that what you are getting at?

Mr. Butterfield: No, your Honor.

Examiner Kolb: That is the best I can get out of your statement so far (Part 2, Page 649).

Mr. Butterfield: That 17 percent refers to 1949. Foster Auto Supply receives 17 percent on $61.04 worth of merchandise. I believe that is what the evidence shows. The Western Spring Service Company received none at all.

Examiner Kolb: On $967.00.

Mr. Butterfield: Received none at all. Leaving it at that, if that is all the Commission had before it was that there was no discount at all to Western Spring Service and a 17-percent discount to Foster Auto Supply Company, if that is all the Commission had before it, the Commission might be led to believe that the Western Spring Service Company was a small distributor who was being frozen out of the Denver market because of the practices of Moog in selling to Foster at 17-percent discount on a $61.00-item, that that illegal practice in itself without the showing of more would eventually force Western Spring Service Company completely out of the market and the B. K. Sweeney Electric and the Steckel Auto Supply and thus create a monopoly in Foster Auto Supply Company, or that Foster Auto Supply Company by receiving this 17 percent had so injured, prevented or destroyed competition in the Denver area that there no longer existed that free competitive enterprise in Denver in regard to coil action sales which the Congress intended to preserve when it amended the Robinson-Patman Act, when it amended Section 2 of the Clayton Act called the Robinson-Patman Act to Section 2 of the Clayton Act (Part 2, Page 650), or that these pricing

practices prevented, injured or destroyed the competitive business marked between the customers of Foster and Western Spring and B. K. Sweeney or that Moog Industries was injuring other manufacturers of automotive parts such as Western Spring Service and Geary-Hershey Metal Products and the car manufacturer suppliers and other manufacturers of coil action parts. Now, if the Commission had only this before it, it might draw such a conclusion. If such a conclusion were drawn by the Commission from this record, I would have been completely derelict in not bringing the fact to the Commission that in so far as this Exhibit 66 is concerned in coil action sales to jobbers in Denver, Colorado, by Moog Industries that these men have testified up until now on this they have not been injured or hurt nor have their customers been injured or hurt nor is there any reasonable possibility of Moog Industries or any of its customers monopolizing the automotive market in Denver, Colorado, in the sale of automotive parts.

This difference that is shown here as Moog Industries' sales to Western Spring and Foster Auto, to use the extremes here, 17 percent as shown by the evidence so far introduced in the Denver area, is a difference that is considerably less than the differences at which these customers of Moog, themselves sell and distribute Moog products, and, as they have testified, it is the practice in the industry when you buy (Part 2, Page 651) as a distributor to sell to all classes of customers. Those who buy on the blue sheet sell at every price from the next highest price to the list price. That is the purpose of the questioning that I have made of this witness, is to demonstrate that, to give the facts from which the Commission can draw the conclusion as to whether or not there has been or whether these price differences amount to that thing which Congress referred to when it passed the Robinson-Patman amendment to the Clayton Act in which Congress said it shall be illegal to discriminate in price where the effect of such price, such discrimination, where the effect of such discrimination is to tend to create a monopoly or to prevent, to injure or to destroy commerce in any line of interstate commerce between the sellers or between the customers of either the buyers or the sellers.

Examiner Kolb: Doesn't your statement boil down to the proposition there can be no price discrimination under the Robinson-Patman Act as long as the customers can buy comparable materials from some other supplier?

Mr. Butterfield: My position is this: that there can be no such thing as a price discrimination under the Robinson-Patman Act unless it has been shown and demonstrated that there has been an injury to competition or there has been a reasonable possibility of a tendency to create a monopoly. That is, it is not my contention, and I do not (Part 2, Page 652) believe it is the Commission's contention that every price difference amounts to a price discrimination and these price differences that are shown on this sheet, and there is only one reason for which this sheet could have been introduced and that is to show a price difference, and the theory, as I understand from counsel for the plaintiff, is that that is all the further he needs to go. That is the prima facie case. Now, if that is his position, that is his prima facie case, I am forced into the position of negating this presumption which counsel has taken and which counsel hopes the Commission may take negating this presumption by fact and testimony in the record.

Examiner Kolb: It is too complicated for me. Is there a question pending?

Mr. Schrup: I think Mr. Butterfield meets himself coming back. Our position is briefly this: that we see no reason in the absence of cost justification and in the absence of a possible 2 (b) defense why Moog Industries, Inc., can charge different prices to competing customers. Now, the testimony here is that these various jobbers must handle many, many lines, and I think it is just as obvious as the nose on your face, if the Foster Auto Supply Company gets 17 percent on everything it buys and somebody else doesn't and they are competing, one is hurt very badly.

Mr. Butterfield: Do you also maintain that, if the (Part 2, Page 653) wholesaler sells, that he has to sell at the same price to everybody? Do you maintain that the consumers' prices are out of line because of the margin of mark-up?

Mr. Schrup: That is not the question at all, Mr. Butterfield. The statute provides that any customer that competes with another customer in the absence of justification by the seller must be treated the same. That is, all distributors buy at the same price in the absence of any justification. When the distributor buys at the distributor's price, he can sell at a different price from a jobber, but when he competes with a jobber and sells at a distributor's price, he performs no function at all to that jobber. He is in competition with the jobber, and they are attempting to sell the same customer with the distributor getting a price rate with no services performed to the jobber for which he gets the price rate.

Mr. Butterfield: Under your theory of the case everything that these men are doing with the merchandise they get is illegal.

Mr. Schrup: Don't put words in my mouth.

Mr. Butterfield: Is that true or isn't it?

Mr. Schrup: The effect on competition—

Examiner Kolb: Let's save this argument for the back room or something and go on with this case. I will let the witness answer the question. Read the last question (Part 2, Page 654).

(The reporter read the last question.)

Examiner Kolb: The witness may answer the question.

Mr. Schrup: We have our continuing objection as we have announced from the very beginning to the introduction of competitor's prices.

A. They will grant me 20 percent off the face of the blue sheet, of course, the same proposition as G and H offers Western.

Examiner Kolb: Do you deal with Moog?

The Witness: I deal with Moog.

Examiner Kolb: Is it the same proposition that Moog offers you?

The Witness: No, sir, it is not. I have to buy so much from Moog to get a volume rebate. I can buy $10.00 worth and still get 20 percent off the face of their invoice, and I am not a warehouse distributor.

By Mr. Butterfield:

Q. Do you sell on this blue sheet, this 7-A, take K-19 there, the top one, the first one, the distributor's price 58 cents, here are suggested resale sheets, 73 cents on 7-B, 57 cents on 7-C, and 94 cents on 7-D, do you follow these resale price lists?

A. We follow these resale price sheets when we sell this type of account.

Q. If you bought this item here at 58 cents, this K-19, you (Part 2, Page 655) would sell it everywhere from $1.25 to 73 cents depending on what type of account it was?

A. What type of account it was (Part 2, Page 656).

Cross Examination.

You're darn right that I can buy similar products to those of Moog from other sellers at cheaper prices than I can from Moog. The reason I buy from Moog is I am primarily their largest leaf spring account in the Rocky Mountain Empire, and I prefer to sell under one catalog which my road men and city man, instead of thumbing through a big, thick catalog, like to sell through one catalog, and Moog has a fine trade name. We pioneered the Regal line in this area. It is not too well known. We feel we want to be on the band wagon. Moog does a lot of National advertising. Regal does not.

Q. In buying, now that you have finally selected Moog products for reasons that you have given us, are you still interested in buying Moog Products that you especially can get at Moog?

A. At the cheapest price they will give me. It has got to be better (Part 2, Page 656).

We started buying coil action parts from Moog about a year and a half ago. Since the first of this year, I have bought exclusively Moog. Before that we bought from Regal. We started purchasing leaf springs from Moog about a year and a half ago. Previously we bought them from Burton and from Tuthill. Their prices were higher than Moog's on leaf springs to this extent that with Moog I worked on a volume rebate on the spring line, and I do come into a nice bracket. As to what our sales of Moog Products are, both leaf springs and coil action parts, it is

difficult to give you an exact figure. I do not know. I would say pretty close to $75,000.00 for the year 1951 (Part 2, Page 657). That includes both leaf and coil springs, and overload, whatever they sell in their line. They have leaf springs and coil springs and chassis parts. As to the percentage of the $75,000.00 in that line, I would say I sold $50,000.00 of their merchandise. As to the coil action line, I would say I only sold Two or Three Thousand Dollars worth. I can't compete with the market.

Q. I understood for 1951 that your entire sales of Moog Products were about $75,000.00?

A. That's right.

Q. How was that broken down? They have a coil action line, and they have a leaf spring line which includes coil springs and chassis parts. Have you any way of dividing that $75,000.00 between those two lines?

A. Yes, approximately $73,000 in their spring line which includes their coil springs (Part 2, Page 658).

Q. That is the leaf spring line?

A. Yes, leaf spring, overloads, and the $3,000 in their coil action.

Q. Coil action line?

A. That's right.

As to the agreement I have with Moog, I buy off of that contract right there (Indicating Commission's Exhibit Number 1, Distributor's franchise). We do not do any subjobbing business in the spring line or in the chassis line. We do no subjobbing business in any of the Moog products. We do sell Moog Products over the counter, both retail and wholesale (Part 2, Page 659), I would say that about 90% of our sales are wholesale sales to the different type of accounts—dealers, garages, general trade, and companies that authorize their employes to buy under a purchase order.

Re-Direct Examination.

As an example of a company that authorizes its employes to buy under a purchase order, for instance Yellow Cab Company will issue a purchase order to their employes; Pacific Inter-Mountain Express will do it; Gallagher Transfer Company will do it; Public Service Com-

pany of Colorado will grant their employes that. We do not give those employes, if they do not have a purchase order different prices if they want to buy one for their own car, unless we know they work there, are entitled to have a purchase order, and have bought previously from us. If they work at that place and have previously bought from us on a purchase order, then they can buy the same item for their own car at that same price (Part 2, Page 660).

We manufacture approximately 5% of our leaf springs. None in the coil springs. They are manufactured in competition with Moog. We manufacture some of the same items that we buy from Moog.

RICHARD F. PATTERSON testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Richard F. Patterson (Part 1, Page 661). I am connected with Colorado Jobbers Supply, 875 Broadway, Denver, Colorado.

I heard the testimony of Mr. Livonius of Western Spring Service. I heard him refer to this Geary-Hershey deal that he had. The witness was asked how exclusive that deal was in the Denver area and stated that they had offered the deal to him within the last three weeks on the same basis on the same basis that they were selling Western Spring Service. I did not accept the deal, however, even though they offered it to me. I do not buy those products from Moog Industries. At the present time I am buying them from Toledo Steel Products.

Q. Have the pricing practices of Moog Industries, in distributing its automotive products here, have they injured Colorado jobbers? (Part 2, Page 662.)

A. No.

Mr. Schrup: I would like to get an objection in here. I understand the witness is not purchasing, the Colorado jobbers is not purchasing Moog products at the present time.

The Witness: That's right.

Mr. Schrup: I think the question is entirely out of order.

Q. Well, you are in competition, are you not, with Moog customers?

A. Yes, sir.

Q. Do Moog distributors sell to the same people you sell to?

A. That's right.

Mr. Schrup: The question you directed was the practice that exists between Moog and its customers.

Mr. Butterfield: Yes. I said do the pricing practices of Moog Industries injure him in dealing with his customers.

Mr. Schrup: Well, he doesn't buy from Moog. The discrimination charge is between the customer and Moog and the injury to their customers.

Mr. Butterfield: The injury to the customers of Moog or the customers of those who buy from Moog.

Mr. Schrup: He doesn't buy from Moog.

Mr. Butterfield: He sells to the same customers that Moog's customers sell to (Part 2, Page 663).

By Mr. Butterfield: Q. Isn't that correct, Mr. Patterson?

A. Yes.

Examiner Kolb: The objection will be sustained (Part 2, Page 664).

* * *

Examiner Kolb: The ruling of the Hearing Examiner refers to the objection to the original question as to whether the pricing practices of Moog affect the jobbers and customers (Part 2, Page 665) in Denver to which the witness answered no. That objection is sustained, and the answer of the witness is stricken.

We buy from Toledo. We sell to certain jobbers in the Denver area, in the three-state area. In fact, we go into four states. We have competition in this area who buy from Moog, and in many cases these competitors sell to the same jobbers that we sell to.

By Mr. Butterfield:

Q. Are Moog's pricing practices,—strike that, please. In the products that Moog sells in this area and in the area in which you sell Toledo products is Moog destroying competition in that area?

Mr. Schrup: Just a moment. I have an objection to that. If testimony is to be brought into this matter properly as to what effect the pricing practices of Moog may have on competitors the proper testimony is the seller competitor of Moog. This man is not a jobber customer of Moog, so, he is in no position to tell the jobber practices of Moog or the effect on that jobber customer.

Q. Do you buy Moog products, Mr. Patterson?

A. No, sir (Part 2, Page 666).

Q. Do any of your customers buy Moog products?

A. Yes, sir.

Q. Do the same customers also buy Toledo products?

A. Yes.

Q. Is there a tendency on the part of Moog to monopolize the sale of those products in this area?

Mr. Schrup: Objection. It calls for an improper conclusion upon the part of the witness.

Examiner Kolb: The objection will be sustained.

Q. Is there to your knowledge any competitive injury in this area because of the way Moog sells in this area?

Mr. Schrup: Same objection.

Examiner Kolb: Sustained.

I have personally been in this area since 1936 in the automotive industry and except during War time, I have devoted myself exclusively to this line of business. I do not know which manufacturer distributes the greater amount of coil action parts in this area, nor do I know which distributes the greater amount of these springs (Part 2, Page 667). I would say there are approximately four competing products of leaf spring products in this area. That is the ones I know. There are about six manufacturers of coil action parts in this area. I think that is correct. There are a larger number of distributors in this area at this time than there were in 1936. I would say there are about 50%

more automotive parts distributors now than there were then (Part 2, Page 668).

There are a larger number of distributors of coil action parts to-day than there were in 1936 and there are a larger number of jobbers distributing leaf springs, chassis parts and coil springs than there were in 1936. Since 1936 there have been a considerable number of smaller distributors entering the field in coil action parts (Part 2, Pages 669, 670). That same answer holds true as to leaf springs, coil springs and chassis parts.

Cross Examination.

By Mr. Schrup:

There are a considerable number more automobiles on the road in 1951 than there were in 1936. In 1936, as best as I can remember back, there were in the neighborhood of four distributors or re-sellers of coil action parts in this area (Part 2, Page 670). To-day there are around twelve. and as to leaf springs distributors I would say there are pretty close to the same number in the Denver and vicinity area.

Re-Direct Examination.

I know what the Moog prices are. I know what the Geary-Hershey prices are. The question was asked of the witness to state whether the prices of Geary-Hershey were less or higher than Moog prices.

There was an objection which was sustained (Part 2, Pages 671, 672).

At the present time I am Sales Manager and Purchasing Agent of Colorado jobbers. It is a part of my duties to acquaint myself with prices and I have acquainted myself with Moog prices as well as Geary-Hershey prices, and I have acquainted myself with the prices of all the distributors of those prices that concerned us in this area. I know what those prices are (Part 2, Page 672). The prices of Geary-Hershey are lower than Moog's prices.

Mr. Schrup: We have the objection in the record. The best evidence of the prices of competitors would be to bring the competitors in, have the competitors bring those price

lists in. We certainly would like an opportunity to examine the competitors.

Examiner Kolb: I doubt if it would help to examine the prices of comparable companies. He can answer as to the price of any particular item that is sold by Moog and sold by Hershey. I think we are going in a roundabout way to attempt to develop that information. I will sustain the objection. Strike the answer (Part 2, Page 673).

Denver, Colorado, October 14, 1952.

RUSSELL E. FARRIS resumed the witness stand and testified on behalf of Respondent as follows:

Re-Direct Examination.

At this point Respondent's Exhibits Numbers 10-A, 10-B and 10-C were marked for identification.

Yesterday I testified that I was purchasing coil action parts from Regal Tool and Manufacturing Company under the designation of coil suspension parts. Exhibits 10-A, 10-B and 10-C correctly state the conditions under which I buy Regal Coil Action Parts and that is a schedule of my purchases for the years 48 to '51, inclusive.

At this point Respondent's Exhibit Number 11 was marked for identification (Part 3, Page 676).

At this point, Respondent's Exhibit 10-A, B and C were offered in evidence. There was an objection made to the offer on the ground it was immaterial to any of the issues, and after argument between counsel the Examiner delayed ruling on the objection (Part 3, Pages 677, 678).

The witness was then asked if the invoice, Respondent's Exhibit Number 11, correctly reflects the effect of the terms and conditions contained in the Regal contract (Part 3, Page 678). There was an objection and the objection was sustained.

The examiner suggested to Respondent's counsel that he have the witness explain further what the document was before passing on objection. The witness explained the document by stating that when Regal's Tool representa-

tive came out to Denver, the witness pioneered this line in the Rocky Mountain Empire; that Regal had been their only source of supply so far and that one of these exhibits is the document given to him as a contractor, the contract stating in its different schedules how much I am supposed to maintain. I have never bought any purchases unless they show just exactly what the purchases have been (Part 3, Pages 679, 680).

This invoice is one received from Regal Tool and Manufacturing Company. It has been paid at the amount shown there and my books will so reflect it.

At this point counsel for the Commission made a further objecti as follows:

We have no way of knowing whether this particular contract is a usual or unusual contract or a standard contract, whether it is one they use nationwide or whether used in selected areas, or whether it is an individual contract with this particular buyer. We have a right to ascertain all the pricing practices of Regal. The proper witness for that is to bring into this trial the competitors of Moog, whose prices he is seeking to introduce in this indirect manner.

At this point the Examiner questioned the witness, who testified as follows: I have never signed a contract with Regal Tool and Manufacturing Company, to my knowledge. Respondent's Exhibits 10-B and 10-C is a statement of the terms and conditions under which Regal Tool and Manufacturing Company hopes to sell their merchandise to us. I do believe I did sign a contract, now when I think of it, similar to this one, and they took it back with them, as I recall it now. I did not retain a signed copy signed by them.

At this point Respondent's Exhibits 12-A, B, C, D, and E were marked for identification (Part 3, Page 681).

Counsel for Respondent then resumed the questioning.

Witness was then shown Respondent's Exhibits 12-A, B, C, D, and E and asked if those were the price lists under which this invoice was billed.

The witness replied that this price billing here has been changed since; that this was their latest price and is not the same as that one. The witness stated that he bought

on this sheet, Respondent's Exhibit 12-A, and that Respondent's Exhibits 12-B, C, D, and E were suggested prices furnished by Regal Tool.

At this point, Respondent's Exhibit 13 was marked for identification (Part 3, Page 682).

Respondent's Exhibit 13 is the catalog describing the various items contained in the price list.

Examiner Kolb: As I understand, Mr. Farris, Respondent's Exhibit 12-A, which is the wholesale distributor's price sheet, shows the prices at which you purchased from Regal, subject to a discount as provided in Schedule A of the Schedule of Discounts?

The Witness: Well, they say you must maintain $25,000 worth of merchandise here and you are granted 20 percent. I have just been buying whatever I so desire and still getting the 20 percent on the face of the invoice.

Examiner Kolb: You received 20 percent discount on all purchases made and the purchases shown in Respondent's Exhibit 10-A show the purchases made during the particular year?

The Witness: That's correct.

Examiner Kolb: And on those you received the 20-percent discount?

The Witness: That's correct (Part 3, Page 683).

At this point Respondent's Exhibits Numbers 10-A, 10-B, 10-C, 11, 12-A, 12-B, 12-C, 12-D, 12-E, and 13 were received in evidence.

We sell the items purchased from Regal Manufacturing Company according to the schedule that they put out. They have a wholesaler's schedule, a dealer's schedule, and a general trade schedule. We purchase this on the white sheet. We sell some of the items on the blue sheet, Respondent's Exhibit 12-B; and some of the items we sell on the pink sheet, Respondent's Exhibit 12-C; and the white sheet is Respondent's Exhibit 12-A, the one we buy on. Some of the items we sell on the green sheet, Respondent's Exhibit 12-D; and some of the items that we purchase on the 12-A sheet we sell on the yellow sheet, Exhibit 12-E (Part 3, Page 684).

The witness' attention was called to a typical item, R-25, and asked what it was (Part 3, Page 684). R-25 is an upper outer pin for a Chevrolet. The corresponding number in the Moog line is K-25. We purchase the item R-25 under Respondent's Exhibit 12-A and sell it under Respondent's Exhibits 12-B, C, D, and E.

At this point leave was granted to substitute photostatic copies of the exhibits (Part 3, Page 685).

Cross Examination.

I previously stated that I estimated our sales of Moog Products for 1951 was approximately $75,000.00. What I meant was I purchase about $75,000.00 from Moog.

Re-Direct Examination.

Of the $75,000.00 that I purchased from Moog, a very small percentage is coil action parts. I would say less than $2,000.00. The balance of the purchase is leaf springs, overloads, and coil springs.

GEORGE C. SWEENEY testified as a witness on behalf of Respondent as follows (Part 3, Page 686):

Direct Examination.

My name is George C. Sweeney. I am Vice-President of B. K. Sweeney Electric Company. I have been with them since 1939, and the company has been in business since 1901. Our company is smaller than Hendrie & Bolthoff. I cannot state how much larger it is than our company. Hendrie & Bolthoff went in business some time in the eighteen hundreds. At this point the witness was shown Commission's Exhibit Number 66, purporting to reflect coil action parts to jobbers in Denver, Colorado, for the year 1947, and was shown the different discounts received by various jobbers and was asked whether as a result of that difference whether B. K. Sweeney Electric Company suffered any loss of sales by virtue of that difference in rebates.

Counsel for the Commission objected as calling for speculation and conclusion, and was sustained.

The witness was then asked the question whether Foster Auto Supply was as large in 1947 as B. K. Sweeney Electric Company.

There was an objection and the objection was sustained.

Respondent made an offer of proof as follows:

Mr. Butterfield: I offer to prove by Mr. Sweeney the Foster Auto Supply Company is a very small business compared with B. K. Sweeney, and this was the small businessman, the Foster Auto Supply Company, that received a rebate discount, functional compensation potential for the mariginal mark-up of 2½ percent on his sales on the volume rebate more than his large competitor, B. K. Sweeney Company. I offer to prove (Part 3, Page 689) by this witness that the fact that the Foster Auto Supply Company received 9 percent on $8,085.74 worth of sales and the fact that B. K. Sweeney received 7½ percent on $5,895.04 for a period in 1946-47 of which only two months were for the same period, I offer to prove by this witness that the B. K. Sweeney Electric Company did not suffer an injury to its competitive position in the Denver marketing area by virtue of that. Further, I offer to prove that the ability of the Foster Auto Supply Company to create a monopoly in sales of coil action parts in the Denver area is not reasonably possible under the present marketing conditions in Denver, nor is it reasonably probable or possible that such an event will accrue from the giving of volume rebates on purchases of coil action parts afforded by Moog Industries, Inc. to the distributors in this area. It is for those reasons that I have asked this question.

Examiner Kolb: The offer of proof will be denied.

By Mr. Butterfield:

Q. I call your attention to Government's Exhibit 66 for the year 1948. I beg your pardon, I will withdraw that. The year 1949, in which the B. K. Sweeney Electric Company for the year ending 2/28/49 purchased from Moog Industries, Inc., coil action parts $3,811.44 on which it received a volume functional compensation and volume rebate discount for potential marginal mark-up (Part 3, Page 690).

Mr. Schrup: May I ask you if you are going to use the word "functional discount" use it correctly. We are not attacking functional discount as you know. So, don't inject it into this record. It is a prejudicial matter.

Examiner Kolb: Read the question, Please.

Q. —of 5 percent and where the Foster Auto Supply Company for the 6-months period commencing July 1 of 1949 for five months subsequent to the period they were just talking about from July 1, 1949, to December 31, 1949, purchased $61.04 on which it received or purported to have received a 17-percent functional compensation volume discount rebate or potential marginal mark-up of 17 percent, whether the facts as reflected on this exhibit or whether the facts as they exist resulted in an injury to the B. K. Sweeney Electric Company in the sale or distribution of Moog coil action parts.

Mr. Schrup: Same objection as previously made—

Q. In Denver, Colorado.

Mr. Schrup: It calls for speculation.

Q. —for the period covered by the exhibit.

Mr. Schrup: May we have the question read back? I think there are so many alternatives in it.

Examiner Kolb: It appears to be a hypothetical question. It does not appear to reflect the correct facts as set out in the exhibit. Objection will be sustained (Part 3, Page 691).

The witness was then asked to examine Commission's Exhibit 66 and was asked whether there are any facts on there that reflected an injury to B. K. Sweeney Electric Company in the competitive distribution of Moog Coil Action Parts for the periods covered by this exhibit.

There was an objection on the ground that it was a roundabout way of asking the witness to determine the ultimate facts in the case, and the objection was sustained.

The witness was then asked if the Foster Auto Supply Company had at any time in the past, or was now, injuring B. K. Sweeney Electric Company in its competitive distribution of coil action parts of Moog Industries in the Denver area.

This was again objected to on the grounds that it called for a conclusion and speculation, and the objection was sustained.

Q. Mr. Sweeney, would you or would you not know whether you were being injured competitively in the sale and distribution of coil action parts in the Denver area? (Part 3, Page 692.)

A. Well, all I can say is I would not know, but the results would indicate that we were.

Mr. Schrup: I think in view of the fact he would not know I move to strike the answer.

Examiner Kolb: The latter part of the answer as to the results will be stricken. The witness' answer stands.

We are now selling a small amount of Moog coil action parts in the Denver area.

Q. Is there any reason why since 1949, when you purchased $3,811.44 worth of Moog coil action parts, and I understand you are purchasing none direct from Moog at the present time?

A. Not to my knowledge unless we are picking up local warehouse articles.

Although we purchased for three successive years, according to Exhibit 66, $5,895.00, $8,234.00, and $3,811.00, the reason we are no longer a customer of Moog's is that we are buying from another supplier (Part 3, Page 693). I cannot answer the question as to whether we are now buying at better prices or not, but I guess it is the same, but I don't know actually whether it is or not. Our present supplier of coil action parts is Seld Power Corporation, Muskegon, Michigan.

Cross Examination.

During the years 1947, 1948, and 1949, when we were a purchaser of Moog Products, the trade area in which we offered them for sale was, generally speaking, in Colorado. We offered the products to service stations, garages, car dealers, redistribution accounts and fleets (Part 3, Page 694). Distribution accounts are those that buy from us rather than buy direct from the manufacturer for re-sale.

B. K. Sweeney has branches at Colorado Springs, Pueblo, Alamosa, Grand Junction, Greeley, Fort Collins and Sterling and one in Englewood and Aurora. We travel salesmen out of all the branches. Our company sells a number of various automotive lines, approximately 200 lines of automotive parts (Part 3, Page 695). It is a fair statement to make that our overall profit on each one of the lines contributes to our general business health.

According to Commission's Exhibit 66, in 1947 we received 7½% on our purchases of Moog products. It is fair to say we would have preferred to have received 9%.

Q. Would you tell us why?

A. Well, I think you answered it for me: to make a little more profit.

Re-Direct Examination.

Q. Would you have preferred that Moog Industries give them to you at no cost to you? Well, let me put it this way: Would the answer to my question that I gave you be the same as your answer to Mr. Schrup's question?

A. That's right (Part 3, Page 696).

The witness was shown Commission's Exhibit 15, distributor's net cost sheet in Coil action parts, known as the "Blue Sheet", and asked if he purchased from Moog Industries the coil suspension parts, as shown on Commission's Exhibit 66, at the prices listed on that sheet.

The witness stated he was not familiar enough with the details of business to know whether that was the sheet that he bought off of; that he judged, by looking at the type of sheet, that it was the sheet they used to buy from as a distributor's sheet (Part 3, Page 697). We purchased on the blue sheet and sold them on the pink sheet prices. We sold some of the same items that we purchased on the blue sheet at green sheet prices, and sold some of the same items purchased on the blue sheet at canary sheet prices, and we sold some of the items that we purchased on the blue sheet at list.

October 21, 1952, at Dallas, Texas.

HUBERT B. BRADEN testified on behalf of Respondent as follows:

Direct Examination.

My name is Hubert B. Braden. The name of our company is American Gear and Parts Company, Inc.; we are engaged in the distribution of automotive products in the Dallas area. I am President and General Manager of that company. I have been in the automotive parts business since 1916 (Part 3, Page 700). It was a corporation when we took it over in 1943 and I was President. Then it was a partnership in 1944, and was so operated until either 1947 or '48, when we re-incorporated, and I was Manager and president at that time.

Q. I show you Government's Exhibit 79-F, indicating sales of leaf springs and coil springs and chassis parts for the year ending—for the fiscal year 1950 from Moog Industries, Inc., by distributors in Dallas, Texas, the Automotive Appliance Company, showing gross purchases of those products of $216.63, on which a 12% allowance was made from distributor's net prices; Motor Supply Company of Dallas, Texas, $1,301.62, on which an allowance of 12% was made from Distributor's net prices; American Gear & Parts Company, purchases of $553.76, with an allowance of 13.47%; Terry Automotive Supply, purchases of $955.42, on which an allowance was made of 15% on distributor's net prices for that year; Henderson Auto Parts, purchases of $523.18, on which is shown no allowance; and Truett-Worrell Spring and Aligning Company, purchases of $4,090.16, on which an allowance was made of 7.29% on distributor's net prices. I will ask you whether you know whether or not the fact that an allowance of 15% was made to the Terry Automotive Supply Company injured your company, American Gear & Parts Company, competitively (Part 3, Page 701 in the distribution of Moog Industries' leaf springs, coil springs, and chassis parts during the period indicated?

A. No, sir.

Q. Do you know whether it did?

A. No, sir. Frankly, I didn't know Terry Automotive had Moog up until three or four months ago.

Q. Well, were you injured competitively by it?

A. No, sir.

Q. By virtue of the spread you were not?

A. No, sir.

Cross Examination.

The witness was asked if he was interested in purchasing Moog Products as cheaply as possible, and answered that he was. He was then asked why, and answered the cheaper we buy merchandise the more profit we make when we sell it (Part 3, Page 702).

Q. And that helps you competitively?

A. Well, you can put it competitively, not necessarily competitively, but it gives us more profit on our total sales.

If we make more profit, we make more money and pay more dividends to stockholders. We would expand our business.

The witness was asked if he knew the price at which his competitors bought Moog products and his answer was that they buy all Moog products off of one sheet, which is distributor's net price sheet. I do not know the discount or rebate that our competitors receive, and I knew before coming to this hearing that Terry Automotive Supply was getting a 15% rebate while I was only getting a 12 or 13.47%. Mr. Butterfield showed me that about a week or ten days ago. I got 13.47 in 1950 (Part 3, Page 703). I would prefer to get 15% if our purchases run into that. I think our purchases this year will put us in the 15% bracket. I know of no objection to buying at the cheapest price. I am a member of a buying group—Automotive Southwestern, Inc., located at 2101 Commerce Street. I am President and General Manager of that group. That group has a standard distributor's contract with Moog, operated strictly on a rebate basis according to our purchases. The members purchase through Automotive Southwestern purchase forms (Part 3, Page 704). If a member wants to order Moog products, he

fills out the Automotive Southwestern form to Moog Industries to ship to him and he mails the order to Moog. Moog ships direct to him and bills Automotive Southwestern, in duplicate. The original goes to Southwestern at Dallas, and the duplicate and triplicate go to the member. Automotive Southwestern, in turn, charges the member with that invoice on our books, and once a month renders him a statement for all purchases of all lines. The member pays his bill on the 10th, Southwestern remits to the manufacturer, and at the end of the year Moog gives us check for the rebate that is earned, whatever scale of rebate we get into and this year we got into the 13.47% bracket. The group distributes that check to each member according to his purchases, less his pro rata share of the operating cost of the organization. There are sixteen members in our group (Part 3, Page 705). I don't have the list of members with me, but I believe they are as follows:

American Gear & Parts Company, Dallas; Automotive Parts & Supply Company, Tulsa, Oklahoma; Automotive Supply Company, Amarillo; Barrett's Automotive, Lubbock, with branches in Odessa and Abilene; Davis Automotive Supply, Henderson, with branch in Rusk and a branch in Orange; Davis Automotive Supply, Canyon, Texas; East Texas Automotive Supply, Tyler; Kennedy Supply Company, Shreveport, Louisiana; Hall-Fuller Company, Austin, Texas; Moore Brothers Electric, Houston; Mount-Joy Parts Company of Houston in Houston, Texas; Motor Parts Company, Corpus Christi; Galbert Brothers in McAllen (Part 3, Page 706).

These jobbers are not all the same size. Some are smaller and some are larger. American Gear and Parts Company, my company, from a redistribution standpoint covers what we call Northeast Texas, which would be a line approximately North of here to Red River, which includes Gainesville, across to Paris, down to Commerce, Sulphur Springs, in through Gilmer, Tyler, Athens, and back into Dallas normally. Also in the City of Dallas calling on small jobbers. When I say "re-distribution" I mean reselling the small jobbers. About 70% of our sales are in that category and the other 30% are to car

dealers, fleets, and independent garages. Our trade for those latter sales is somewhat smaller as far as fleets and independent garages in the City of Dallas is concerned. We do get into Mesquite, Garland and Grand Prairie but in a very small way (Part 3, Page 707).

I cannot tell you accurately how many of the members of Southwestern are purchasing Moog products. My estimate, without looking at records, is that there are nine or ten. Prior to buying from Moog Industries, we handled Thompson products. However, originally Thompson did cover the front end parts completely and that was the reason for taking the Moog line at that time, and it still is the most complete front end parts line in the business, and that is the reason we sell Moog products. I would say there are approximately ten of our members handling Moog products. There are sixteen members in our group and six purchase from sources other than Moog (Part 3, Page 708).

As to the circumstances into which we entered into a contract with Moog Industries, American Gear and Parts Company were buying from Moog before we got into the group, and after we got into the group we merely switched our purchases through Automotive Southwestern. I cannot tell you offhand whether any of the officials of Moog called on me when we changed over. That is too far back. I have known Mr. Appel, the General Manager for years and years, and I don't think Mr. Appel has ever been in Dallas. He didn't come to see us.

The witness was asked the question whether he would consider it desirable, from the group standpoint, if all the members purchased from Moog, and the witness answered, "not necessarily, no, sir" that the group was getting into the extreme bracket, and that those members who do not see fit to handle Moog do not have to. On the present basis of purchasing, I am positive we are in the top bracket now (Part 3, Page 709). If we are not there in the top bracket now, naturally we would like to reach it. It would be more profitable. Up until we became members of the group, our purchases from Moog didn't allow us to sell as re-distributors. In other words, we couldn't sell the Moog line to a jobber because there

was not any profit to the company, and yet to-day 70% of our Moog products is going to other jobbers. Our members do their purchasing as a group to re-sell to other jobbers.

Q. Do you enter into a contract between the jobbers, yourself, and Moog?

A. Normally they have a contract we can sign up, but normally we don't; I don't think we have one signed. But that is the basis on which we are operating. We do not report our sales to Moog. We do not purchase all the products of Moog (Part 3, Page 710). We purchase from them coil action and front end parts or coil action and coil springs. That comes under leaf springs, but we do not handle leaf springs at all. Normally our purchases on leaf springs would not run $25.00 a year, and we do not handle their piston rings.

The witness was asked the question—prior to the changeover by the group to the Moog Industries line, how many members of the group were purchasing Moog products? The witness answered that was a question he could not answer because when the group was organized there were only originally four members. Other members have come in over the years. That he thought that the group was organized in 1945 and that American Gear and Parts was probably the fourth or 5th member. As to how many handled Moog products before they went into the group and how many handle them to-day, he could not tell that, but that he did not think that any of them switched to Moog that were not originally handling Moog products; that he believed the ones handling Moog products to start with were continuing to handle them through the group (Part 3, Page 711).

Re-Direct Examination.

Prior to the formation of the group there was always a certain amount of distributors in Dallas pooling their purchases from various manufacturers. To-day, Sunnen Products have a quantity price on a lot of their merchandise, and Albert Taylor Automotive Supply and I usually pool our purchases. One time I will buy and they ship to us, and another time he will buy and they ship to him.

On motion the Trial Examiner struck this answer. I remember that we sell these small jobbers on the blue sheet prices.

Q. Now, if this volume rebate to which has been referred here should be eliminated, you would lose about 70% of your volume, wouldn't you? (Part 3, Page 712).

Mr. Schrup: I object to the hypothetical situation.

Mr. Butterfield: I believe on cross-examination Mr. Schrup asked a question of this witness about what percent of his present volume was to small jobbers, and his answer was 70%. Now, the witness has said he sells these small jobbers on the blue sheet and that the volume discount, he says, is the margin by which he is enabled to handle that redistribution.

Mr. Schrup: That question was objected to.

Mr. Butterfield: I did not object. You asked the question, and I made no objection.

Trial Examiner Kolb: Read the question.

(The reporter read the question referred to.)

Trial Examiner Kolb: There is nothing involved in any elimination of rebate, is there?

Mr. Butterfield: I just asked him if—

Trial Examiner Kolb: (Interposing) That has nothing to do with this case. The objection will be sustained.

Mr. Butterfield: Do I understand that volume rebate is not involved?

Trial Examiner Kolb: No, there is no question, as I understand it, about any elimination of the discount to the distributor.

Mr. Butterfield: Well, I asked for a bill of (Part 3, Page 713) particulars. I really can't tell what is—

Mr. Schrup: (Interposing) If you are going to go into another argument on the record in the presence of witnesses, I will have to make a motion again to exclude the witnesses.

Trial Examiner Kolb: As I understand, this case does not involve the elimination of the discounts to jobbers or to distributors, as such. Your question is predicated upon the theory that would be eliminated. That not being in-

volved, I sustained the objection. Proceed with your next question.

Mr. Butterfield: I think the question was misunderstood, but I will rephrase it.

By Mr. Butterfield:

Q. Mr. Braden, referring to Exhibit 79-F, showing 13.47% differential from distributor's net prices on $553.76 worth of merchandise in the fiscal year ending 1950, I ask you whether or not the elimination of this differential, 13.47, of distributor's net prices, the elimination of that differential would result in the loss of approximately 70% of your present redistribution volume on the Moog line?

Mr. Schrup: The same objection as previously made.

Trial Examiner Kolb: Sustained.

Mr. Butterfield: I offer to prove by this witness (Part 3, Page 714) that the price differential shown on Exhibit 79-F between distributor's net prices—

Trial Examiner Kolb: (Interposing) Off the record.

(Discussion off the record.)

Trial Examiner Kolb: On the record.

Mr. Butterfield: I'd like to finish my offer of proof. Will you read as far as I got with it, please?

(The reporter read the statement referred to.)

Mr. Butterfield: —from distributor's net prices, if eliminated by Moog Industries, Inc. would result in the loss of approximately 70% of the present volume of American Gear & Parts Company in redistribution to small jobbers.

Trial Examiner Kolb: The offer of proof being based on a contingency which is not involved in this proceeding, it will be refused (Part 3, Page 715).

ALBERT S. TAYLOR testified on behalf of Respondent as follows:

Direct Examination.

My name is Albert S. Taylor, and I am Secretary and General Manager of Automotive Appliance Company.

Q. Mr. Taylor, I call your attention to Government's Exhibit No. 79-F, showing for the year ending 12/31/50, purchases by Automotive Appliance Company of $216.63 of leaf springs, coil springs and chassis parts from Moog Industries, with an allowance off distributor's net prices of 12%. I call your attention to American Gear & Parts Company purchases for the same period of a little over twice that amount, $553.62 (Part 3, Page 716) with an allowance off distributor's net prices of 13.47%; Terry Automotive Supply, purchases of $955.42, with an allowance of 15% off distributor's net prices, and I will ask you if you know whether or not you were injured competitively during that period of time by virtue of the fact of this differential spread on allowances off distributor's net prices in the purchase of Moog leaf springs, coil springs and chassis parts resold by you to your customers?

A. Yes.

Q. You were so injured?

A. No.

Cross Examination.

The trade territory of Automotive Supply Company is a fifty-mile radius of Dallas. We employ five salesmen who sell through that territory. In the re-sale of Moog products we re-sell to car dealers, garages, fleets, and service stations (Part 3, Page 717). I do not believe we sell any Moog products to jobbers. I am a member of a buying group. Its name is Ark-Tex Warehouse Distributors, located in Texarkana. I hold no office in that concern.

I believe I am familiar with the buying prices of the various other purchasers competing in the re-sale of Moog products with me in the Dallas area. We are supplied the catalog sheets. I have their actual buying prices available. I know to-day what the buying price would be of a member of the Southwest Warehouse Group based on rebates. I don't know the actual net buying price.

I have been purchasing Moog products eight to ten years. I became a member of the group about two or two and a half years ago (Part 3, Page 718). I believe there are fourteen members belonging to that group. They are: Cogdell Automotive Supply in Fort Worth; Motor Supply

Company, Marshall; Motor Supply of Dallas; Cogdell Motor Supply, Waco; Mt. Pleasant Auto Parts Company; Tyler Service Parts Company, Tyler; Westbrook-Reynolds Company of Texarkana; Sulphur Springs Auto Parts; D. White Auto Parts Company, Henderson; Grant Auto Parts Company, Paris; Riley-Ball Motor Supply Company at Longview, and Riley-Ball Motor Supply at Gladewater. There is an account in Houston; I don't believe I can call the correct listing of their company; it is just a new member.

I do not know how many of those members purchase Moog products. We purchase Moog products through purchase orders written direct to Moog or their warehouse. The Moog salesmen call on us possibly once or twice a year, and when they call they try to promote the sale of their line to us (Part 3, Page 719). I have never requested their salesmen to accompany our salesmen on calls to our customers, but I am sure they do. I could not say if they have ever referred any orders to us. They check our inventory and we place our orders with them and they take the order along with them. Most of our orders are delivered from their local warehouse located here in Dallas (Part 3, Page 720).

We pay for the products through Ark-Tex Warehouse Distributors. We receive an invoice from Moog for the purchase. During the month we will receive a recap of different manufacturers' purchases billed to us by Ark-Tex. At the end of the month we receive a statement of the Ark-Tex invoices and make direct payment to Ark-Tex, and they, in turn, pay Moog. We obtain our rebate on the purchase of Moog products at the end of the year. It is paid in the form of a check by Ark-Tex, coming direct from Ark-Tex to us. I couldn't say as to how the check is figured as to what is due us. I could explain the entire method that is figured, but whatever the total volume, we are placed into that bracket and get our pro rata part of the rebate received (Part 3, Page 721). That bracket is obtained by the combined purchases of the various members of the group. According to the figures that I am looking at here, in 1949 we were placed in a bracket which gave the group a 12% rebate in buying Moog products. Our company is interested in buying Moog products

at the cheapest price possible. The reason for that is profit. That enables us to expand and grow.

Q. Now, directing your attention to Commission's Exhibit 79-F, I believe Mr. Butterfield called your attention to various customers of Moog listed opposite Dallas, Texas. Here is your company. Your purchases had a rebate of 12%. I direct your attention to Terry Automotive Supply, a member of the Southwest Warehouse Group, receiving 15%. Would you prefer to receive that amount, rather than 12%?

Mr. Butterfield: I object, if Your Honor please.

Trial Examiner Kolb: Overruled. You may answer.

A. Yes (Part 3, Page 722).

Re-Direct Examination.

I do not consider the ability to grow and expand as being anything evil or illegitimate.

CHARLIE S. COOK testified on behalf of Respondent as follows:

Direct Examination.

My name is Charlie S. Cook; I am President and General Manager of Motor Supply Company of Dallas.

Q. I call your attention to Government's Exhibit 79-F. The Motor Supply Company of Dallas, for the year ending 12/31/50 is shown as having purchased $1,301.62 worth of leaf springs, coil springs and chassis parts from Moog Industries, St. Louis, on which an allowance was received of 12% off distributor's net prices. American Gear & Parts Company, during the same (Part 3, Page 723) period of time purchased $533.76 worth of leaf springs, coil springs and chassis parts and is shown to have received an allowance off distributor's net prices of 13.47%. Terry Automotive Supply Company, for the same period of time, is shown to have received on $955.42 worth of leaf springs, coil springs and chassis parts, an allowance off of distributor's net prices of 15%. I ask you if you know whether or not for that period of time the Motor Supply Company of Dal-

las suffered any competitive injury by virtue of this differential in allowances off of distributor's net prices in purchases of leaf springs, coil springs and chassis parts from Moog Industries, which they purchased from Moog and resold to its customers?

Mr. Schrup: The same objection.

Trial Examiner Kolb: Overruled.

Q. Do you know whether or not you were injured?

A. I do.

Q. Were you so injured?

A. No (Part 3, Page 724).

Cross Examination.

As to what I base my answer to Mr. Butterfield's last question, we use as far as we know the same suggested re-sale price as furnished by the manufacturer; that is our re-sale so far as we know, and that is my reason.

Motor Supply Company of Dallas covers Dallas and about a thirty-five mile radius. We have three salesmen. We sell to independent garages, service stations, car dealers and fleets, and a small amount to jobbers, about from 5 to 7%. We sell a small percentage to car dealers, preferably new car dealers (Part 3, Page 725). I am a member of the buying group known as Ark-Tex Warehouse Distributors. I believe I joined that group in 1950. I first started buying Moog products about five years ago. Naturally I am interested in buying Moog products at the cheapest net price obtainable because there is more profit, so we can pay our taxes.

The witness was asked the question, after all his operating expenses were paid and his taxes were paid what his net return of profit was on his sale. This was objected to as not an issue in the case, and was overruled by the Trial Examiner (Part 3, Page 726). The witness asked if the question was directed to the overall net profit. This was again objected to on the ground that the Respondent could not bear the defense of every line that the witness was buying, and that it was unfair to ask Respondent to bear the burden of defending the whole industry. The witness was directed to answer the question. I'd hate for

you to see my financial statement at the end of the year and try to dig out the profit. You asked for the net figure after everything was paid. The percentage, if I recall, is 6.2%. That is just a figure that I believe is correct as close as I can figure, that 's net profit (Part 3, Page 727). After taxes are paid, it came down to four point something. It came below 4%. I would not be exact as to any part of it.

BEN E. HENDERSON testified on behalf of Respondent as follows:

Direct Examination.

My name is Ben E. Henderson. I am operating the Henderson Auto Parts and have been familiar with the operation of that concern for twenty years (Part 3, Page 728).

Q. I call your attention, Mr. Henderson, to Government's Exhibit 79-F, indicating for the year ending 6/30/50—

A. Yes, sir.

Q. —there were purchases by Truett-Worrell Spring & Aligning Company of $4,090.16 worth of merchandise, with an allowance—merchandise consisting of leaf springs, coil springs and chassis parts—with an allowance off of distributor's net prices of 7.29%; American Gear & Parts Company, purchases of $553.76 worth of merchandise, an allowance of 13.47% off of distributor's net prices, and Motor Supply Company of Dallas, on purchases of $1,301.62, received an allowance off of distributor's net prices of 12%. Automotive Appliance Company on purchases of $216.63 received an allowance off of distributor's net prices of 12%, and I will ask you would you know whether or not by virtue of the spread and differential in allowances off of distributor's net prices the Henderson Auto Parts Company was competitively injured in the purchase of leaf springs, coil springs and chassis parts from Moog Industries, Inc., in the sale of such products to its customers?

A. Yes.

Q. Was it so injured?

A. I do not think so (Part 3, Page 729).

Cross Examination.

Q. Would you tell us the reason why, sir?

A. We have a conservative little business in auto parts; it is a personalized business, and we are not a member of any buying group and we have been up there for about twenty-one years, and I have no particular observation or point to make that we suffered any injury, but as of this time and during this period I have not been able to determine any injury if there was one that we did or might have suffered.

Our trade area is the City of Dallas and occasionally a few customers on the outskirts of the City limits. We do not have any customers in Highland Part or University Park. At the present time I have no salesmen. In 1949 I had a part-time salesman covering the City of Dallas. I make over-the-counter sales (Part 3, Page 730). As to what percentage of our sales that amounts to, I would have to hazard a guess. I would say that about 75% are over the counter. The other 25% are accounts that trade with us—who have credit—and call and ask for merchandise to be delivered. Generally they are service stations, garages, and very few automobile dealers. Occasionally on a critical item they would purchase from us, but not generally. Some few fleets and local service stations and garages.

When I say I was not competitively hurt, I meant by that as follows: As I qualified my statement there, I said I hadn't been able to determine if we were, and we are handling the Moog line and are glad to have it, and it is a satisfactory line and we are satisfied with our profit on it.

Q. We will get to that in a minute. When you say you don't believe you are competitively hurt, you mean you don't know if anybody undercuts the prices at which you offer Moog products to your customers?

A. No, sir, I do not.

Q. Is that the basis on which you say you are not competitively hurt?

A. That is true.

I have an interest in Henderson Auto Parts. It is owned by my family. It has been owned by my father, who was a blacksmith who came to Dallas in 1889. I am General Manager.

Q. I take it from your testimony you are not particularly interested in what price you pay for your merchandise?

Mr. Butterfield: I object to that characterization as to what he takes from the testimony; I think he should confine himself to what the testimony shows.

Trial Examiner Kolb: Overruled.

A. Naturally, I am interested in what we pay for merchandise.

Q. You have been shown the buying prices of your competitors.

A. True enough.

Q. They are all buying considerably cheaper than you are?

A. True enough.

Q. Would you prefer to buy at the considerably cheaper price at which they buy?

Mr. Butterfield: I object to that. It is a very foolish question.

Trial Examiner Kolb: Overruled.

A. I do not know what circumstances confront these other (Part 3, Page 732) people, not having been in their business, and I don't know.

Q. I am not asking about their business; I am asking about your business.

A. Naturally, I would like to buy as cheaply as I could.

Q. Why?

A. Profits, for one reason; availability of the material; a larger stock to operate from; more variety of merchandise for customers to pick from; have less investment in my merchandise. We could go on for time immemorial.

Q. Would that help you competitively?

A. Possibly. I doubt it seriously. Some of these items, as we go through the store there, some items we don't handle for the reason there is a small item mixed up in it for some reason or another.

Q. We are talking about Moog products. You stated the reasons why you would like to buy cheaper products?

A. Yes, sir.

Q. You have given the reasons why?

A. Yes, sir.

Q. Those reasons you have given, you do not consider they help you in your business?

Mr. Butterfield: I object to that as argumentative.

A. Yes, it would help to some degree in the business (Part 3, Page 733).

October 27, 1952, at New Orleans, Louisiana.

ALMON G. BARDIN testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Almon G. Bardin. I am owner of Auto Shock Absorber Sales Company.

Q. I show you Government's Exhibit No. 62, showing coil action sales and rebates to jobbers in New Orleans, Louisiana, by the Moog Industries, Inc., for the years '47, '48, and '49.

The Auto Shock Absorber Sales Company, as shown by this exhibit, purchased no coil action parts from Moog in '48, but in '49 purchased $1,333.71 coil action parts, and paid for them at the rate of 94.6 percent of distributors' net prices, or an approximate rebate there of 5.4 percent.

For the same year Auto Spring & Brake Service purchased (Part 3, Page 738) $6,192.69, and paid for them at 92½ percent of distributors' net prices, or a discount of 7½ percent.

Auto Chassis & Spring Company purchased no coil action parts during that period of time—no, purchased $318.26 in that period of time, and received a cash discount of 6.37, and the excise tax of 15.59, and paid a net price of $296.30, on purchases of $318.26.

Greiner Auto Parts purchased $805.46 for the year ending 12/31/49, and paid for them at the rate of 91 percent of distributors' net prices, or a discount of 9 percent.

I call your attention to the fact that the annual period for Greiner was 12/31/49; the annual period of Auto Shock Absorber, 2/28/52; the annual period for Auto Spring & Brake ended 1/31/49, and the annual period for Auto Chassis & Spring ended 1/31/50.

Do you know, Mr. Bardin, whether, by virtue of this difference in percentages in payment for coil action parts from Moog Industries by your company and the other companies shown there, do you know whether or not you were injured competitively?

A. Yes, I know.

Q. Were you injured competitively?

Mr. Schrup: Just a minute. I have an objection to the answer; improper, calling for a conclusion, speculation on the part of the witness. It is a matter of determination by (Part 3, Page 739) Examiner on the facts as developed, and I don't think any proper foundation has been laid for the witness to answer that question.

Trial Examiner Kolb: The objection will be overruled. The witness may answer.

By Mr. Butterfield:

Q. Were you so injured competitively?

A. No, I was not injured competitively, in my opinion.

Q. Mr. Witness, I show you Government's Exhibit 79(c), New Orleans, Louisiana, showing purchases of leaf springs for the year 1949 by Greiner Auto Parts of $1,898.74, with a discount from distributors' net prices of 4.79 percent.

Auto Chassis & Spring Company for 1949, for the year ending June 30, 1949, purchased leaf springs, $957.20, distributors' net prices without any discount.

And Dealers Truckstell Company purchase of leaf springs for the year ending June 30, 1949, of $1,526.39.

Now, for the fiscal year ending 12/31/50, this exhibit, as you see, shows Greiner Auto Parts having purchased $3,373.71 of leaf springs, coil springs, and chassis parts, with a discount of 14 percent off of distributors' net prices, the Auto Chassis & Spring Company purchasing $1,687.68, with discounts off distributors' net prices of 5 percent; and Dealers Truckstell Company, for the year ending 6/30/50, purchases of $447.30, with discounts off distributors' net price of 5 percent (Part 3, Page 740).

Now, I will ask you whether or not you purchased any of these products from Moog Industries, Inc., during that period of time; that is leaf springs or leaf springs, coil springs and chassis parts?

A. I'd have to check my records to be positive about an answer on that. I believe I did buy some parts from them during that period.

Q. Do you know this Dealers Truckstell Company?

A. Yes. I am not close to them, but I know of them being here, or formerly being here locally. I don't think they are here any more. They used to be back on Broad Street, where they built a new underpass. I understand they went back to their office somewhere up the country (Part 3, Page 741).

Cross Examination.

Prior to 1949, I purchased coil action parts for re-sale from several companies. I bought some parts from Logley on a subjobber basis, such as coil action and coil springs. I bought from Greiner Auto Parts, some from Auto Spring, some from New Orleans Auto Supply, some from out of town from Elgin Machine Works, Elgin, Illinois, some from Regal Manufacturing Company, which subsequently I returned because the merchandise was unsatisfactory, and I bought some from Automotive Wholesale. The balance was not Moog parts. They were not all Moog parts, some and some weren't. As to how many were Moog parts, that would be a hard question to answer. At that particular time, there wasn't an over-abundance of parts, and in lots of cases it was a question of buying them

when you could get them. In 1949 we bought Moog parts. I also bought from other jobbers who represent Thompson Manufacturing Company, and Geary-Hershey, and Permite, and several of them packed under different names (Part 3, Page 742).

Referring to Commission's Exhibit 62, 1949 coil action parts, my reason for buying Moog parts was Moog had a very fine representation in the front end parts business, very good quality merchandise. I selected them because I wanted to try to improve my business. I felt to put Moog's name on my door was an asset to my business. At that time I was rather anxious to try to get lined up with some source of supply on a direct basis rather than being obligated to a jobber with whom I had to deal locally. I felt it would increase the whole picture of my business. In other words, expand my purchasing power. I would increase my credit rating if I am buying from Moog or Elgin or from any manufacturer away from here, and as I pay my bills and they are doing business with me, I get opportunities from other manufacturers who would possibly like to sell me. At present I am not buying direct. Would you like to? No, sir, I would not like to because I am a small business man and while I could possibly buy my parts direct a little bit cheaper (Part 3, Page 743). The method here I am using, for a small operator with limited capital, I have found from experience that I am better off not to buy direct. Yes, in '49 I did buy direct. That is, I thought I wanted to buy direct.

Q. In acquiring Moog parts for resale, are you interested in buying those parts at the cheapest net price available to you?

Mr. Butterfield: I object to that question, please, being rhetorical.

Trial Examiner Kolb: Overruled.

The Witness: Would you give me the question again?

(Record read.)

A. I would answer the question this way: Not necessarily so.

By Mr. Schrup:

Q. Why not?

A. Because I can buy Moog parts locally for a very slight increase over what I would have to pay for them direct, and the local jobber will carry all the cats and dogs that I can carry of popular merchandise, that I sell readily every day, but when I get a call for parts which I can't afford to put up on my shelf because I don't have the capital to put it up there—it is (Part 3, Page 744) not always an advantage to buy too cheap.

Q. Let's put it this way:

In buying the part that you want to offer for re-sale, and you have selected what you want to buy for resale—and we are talking about Moog parts—are you interested in buying those parts that you want to offer for resale cheaper—at the cheapest net price available?

Mr. Butterfield: I object on the same ground.

Trial Examiner Kolb: Overruled.

A. I would say possibly that would be correct, yes. If I would put it this way—

Q. Just a minute.

A. Could I finish answering your question?

Q. Certainly.

A. It might not be necessarily true, to answer your question truthfully. I might be able to buy a particular part from the factory direct a little bit cheaper than I could go over and buy the same part from a Moog distributor here, but I don't have any transportation cost; I don't have any bookkeeping cost—they are less. I can run right over there and get it when I need it, turn around and sell it; I have made my profit and I am happy.

Q. That is very true, but let me ask you this question:

In 1949 you bought approximately $1,300-some-odd worth of coil action parts, according to Commission's Exhibit No. 62 (Part 3, Page 745), upon which you received a rebate of 5 percent?

A. That's correct.

Q. Greiner Auto Parts bought $805, upon which they received a rebate of 9 percent. Now, would you have preferred to receive the 9 percent on those purchases that Greiner Auto Parts received?

Mr. Butterfield: I object.

Trial Examiner Kolb: Overruled.

A. Well, the rebate that you get at the end of the year, it's a nice little thing to receive, I'll agree to that.

By Mr. Schrup:

Q. Would you prefer to receive it or not? Would you prefer to buy it at 5 percent or buy it at 9 percent?

Mr. Butterfield: Same objection.

A. I would say that anybody in their right mind would rather buy it at 9 percent than 5 percent.

I am buying very few Moog parts to-day. I buy to-day several makes of front end parts; I buy some Moog parts. I buy Monmouth, and Geary-Hershey parts. I do not buy any of these parts direct. In re-selling the coil action parts in 1949, I sold to garages, service stations, and independent repair men (Part 3, Page 746).

I sold jobbers only on a courtesy basis. If he was out of some particular number and wanted to pick it up, I'd sell it to him. I made no efforts to get jobber business. I don't cater to that class of trade. I am selfish in my business. I want to deal with people I make the most money from. A little felliw like me can't make a profit selling at a long discount. It has just crossed my mind I am at present buying leaf springs direct (Part 3, Page 747).

In 1949, when I was buying Moog parts for re-sale in New Orleans—coil springs and chassis parts—as appears on Commission's Exhibit 79-C, and Commission's Exhibit 62, I would say I think I was acquainted with the prices that our competitors were paying for those same parts. I was familiar with the entire set-up as far as purchasing direct from Moog was concerned. I cannot tell you to the penny but I have a pretty good idea of the discount from the list price that my competitors were paying. I was aware before I came in to-day that in 1949 I was only getting 5%, and, according to Commission's Exhibit 62, Greiner was getting 9%. It would not surprise me if there were some that maybe were getting more. If my purchases would have justified it, I would have perferred to have gotten more. I wanted to get all I could get (Part 3, Page 748). After I got it I might buy me a fifth of Old Crow.

or something like that, around Christmastime when you get it. As to whether it would help my business to get a better price, it might in a small way help me.

Referring to Commission's Exhibit 97-C, I believe I bought some leaf springs, coil springs and chassis parts during the year of 1950 (Part 3, Page 749). I could not recall how much. As to whether I got any discount, I cannot say. I would have to look up my records. Before coming in to testify I did not check my records for that particular question. I have all of them at home. I can dig every one of them up if necessary. I was not asked to refer to my records to come down here to testify. I just came down to answer any questions that you asked. I may have bought some products direct in 1950 and some of them locally (Part 3, Page 750).

As to the names of the salesmen who called on me from Moog, they have had several salesmen. Ben King calls on me with some regularity, and then they had two other fellows; I can't call their names, but they had two other representatives. Mr. King is in the room here. He comes with some regularity. They have other salesmen, too. I can't think of his name. He came by several times and then I think the sales manager or somebody else from Moog came to call on me a couple of times. That was sometime ago, not recently. The last time King called on me was possibly three months ago. Mr. King did not ask me to come in as a witness. I didn't see him until this morning. Mr. Butterfield requested me to appear here (Part 3, Page 751). I made no reference to my records before coming in to testify.

Re-Direct Examination.

At the present time I am buying the majority of my coil action parts, about 95%, from the NAPA Warehouse, locally. The deal I am getting from them is better. However, the price from Moog would probably be a bit cheaper but NAPA has a warehouse stock here. In other words, they serve a whole bunch of stores and have a tremendous amount of stock and I can draw it by one item at a time, as cheap as I can buy 200 pounds worth from Moog. In a small business, it is awful hard to get an order big enough

to buy a 200 pound shipment. That's the reason I changed my method of operation, the reason that I don't buy any more from Moog except on a pick-up basis, locally. Yes, I handle Moog springs (Part 3, Page 752). I buy those from Trainer National Spring Company, Newcastle, Indiana. I don't think they are giving me a better deal than Moog. I just buy off the distributors' net price sheet. They never approached me on giving me a volume rebate discount.

JOSEPH N. GREINER testified on behalf of Respondent as follows:

Direct Examination.

My name is Joseph N. Greiner. I am Vice-President of Greiner Auto Parts Company, Inc. (Part 3, Page 753).

I am in charge of purchases and sales and I held that same position in 1949.

Q. Mr. Greiner, I show you Government's Exhibit No. 62, showing purchases for the year ending January 31, 1949, by Auto Spring & Brake Service, of coil action parts, from Moog Industries, Inc., St. Louis, in the amount of $6,192.69, at a price of 92½ percent of distributors' net prices. Purchases by Auto Chassis & Spring Company for the year ending 1/31/50, of $318.26. The payment for those distributors—for those goods being $296.30; purchases by Auto Shock Absorber Sales in the amount of $1,333.71 for the year ending 2/28/50, and a price of 94.6 of distributors' net prices, and purchases by the Greiner Auto Parts Company for the year ending 12/31/49, of $805.46, with purchases at a price of 91 percent of distributors' prices, for that period of time.

Now, Mr. Greiner, will you kindly state to what class of customers you sell the merchandise that you purchase from Moog Industries? (Part 3, Page 754.)

A. Independent garages and repair shops.

We purchase on the blue sheet prices. Moog has a suggested re-sale price that we follow because 99% of the factories that we buy from do have suggested re-sale prices.

We use them because if we didn't we would spend all of our time making up our price sheets. Although they are only suggested prices, we follow them. We follow their sheets except on occasions where every once in a while you will have a car dealer, like a General Motors, Chevrolet dealer, who will get short. The only time he buys from us is when he is short. Then when we ask him 60¢ for it and he says I can buy it for 54; I can beat it; we chatter around like that (Part 3, Page 755). This answer was moved to be stricken, as it was hearsay, and the latter part of the answer was stricken.

Counsel for Respondent asked the Trial Examiner to consider his ruling, as it was related by a party to the transaction and testifying as to what occurred at the transaction and at the price at which the item sold, and that the witness was originally called in and testified on behalf of the Commission and had previously testified to sales to car dealers.

The Trial Examiner ruled that he would abide by his decision (Part 3, Pages 756, 757).

We do sell to car dealers but very little. We try to sell them at Moog's suggested re-sale prices so that we can get a normal margin of profit, but sometimes you can't always do that because you have got other people in competition with you who will sort of chisel on the price a little and get it down to where Chevrolet can buy from his factory, and he will get the business. If you don't meet it, you will have to pass it up. A lot of times, it is plus business, so we take it.

Cross Examination.

In the re-sale of Moog products, as a matter of practice we try to follow the suggested re-sale prices. I really don't know what our competitors in New Orleans who re-sell Moog products do as to following suggested re-sale prices. It has never come to my attention. They are competitors—I don't know what they are doing.

Q. Well, certainly, in trying to sell a customer Moog products, if they were offered a better price they'd advise you, wouldn't they?

A. Like the car dealer does? (Part 3, Page 758.)

Q. Well, the other customers, too?

A. You see, on a Moog item, it is not like a Chevrolet item that you go out to sell; it is a car item.

Q. You seem to single out the car dealers for special attention?

A. That is because they put me out of business.

I cannot tell you what percentage of our sales are to car dealers. If I told you what percentage, it would be an estimate and I would not want to be held to it. I would estimate it at about 10% of our sales of Moog products are to car dealers. As to the other 90% of our sales, to my knowledge I have never run into any customers who were being offered the same products by our competitors at a lesser price than that which we offered them (Part 3, Page 759).

We are a member of a buying group known as Cotton States, Inc. We place our order direct to the factory through Cotton States, on an order form. The goods are shipped direct to us. We pay Cotton States and Cotton States pays Moog. There is a rebate returned to us by Cotton States at the end of the year. Moog has a regular rebate schedule. The rebate is made by Moog to Cotton States (Part 3, Page 760), and Cotton States, in turn, rebates our proportionate share to us. At the present time Moog's salesman calls on us. They have had others in the territory. When he comes he checks our store and we get together. A lot of times I will have items that are in obsolescence. I might have some defective merchandise and then we will get together on it. We'll get together and be hollering about some other outfit that is more competitive than we are. You know, try to get the price in line, just normal. As to whether any of the Moog salesmen accompany our salesmen on their calls, they have done so at times when we asked them to. They do "missionary work" with us. Their salesmen have never referred any orders to us for filling (Part 3, Page 761).

In 1949 we had four salesmen. Now we have five. We make no re-sale of Moog products to other jobbers. A Moog salesman calls on us about every six to eight weeks.

He doesn't spend too much time with us because we are all set up and everything. He doesn't have to worry about selling me the line. It is difficult to say how much time he spends. It depends on circumstances and how busy I am. As to how long we have handled the Moog line, I can't tell you that. I came out of the Service in 46 and I think we had it then. I know we had it prior to then. I could not tell you without checking.

Before we had the Moog line we had McQuay-Norris line (Part 3, Page 762). We still handle McQuay-Norris products.

As to what was the occasion for taking on the Moog line, there was more profit in it. Now I still handle McQuay-Norris. I do not handle Moog's complete line even though I could buy through the group, because I can buy McQuay-Norris from a warehouse in town. On some items that Moog sells, I don't do a good enough job to fool with them. I pay more money to McQuay-Norris when I buy it from them. It's like Mr. Bardin stated in his testimony—I can get a sale on something, run downtown and get it, and I have made a fast buck. With the Moog line I have got my money invested and have got obsolescence to take care of. I buy from Moog all my front end stuff, your coil action parts. I buy king bolt sets and shackle sets from McQuay-Norris because I don't do enough business on those to pay me to stock them. The only way you can make money is turnover (Part 3, Page 763). It is obvious I am interested in making money. That's just a business decision and it does not pay me to invest my money and leave it on the shelf. I do a good enough job with the parts I buy from the Moog line to justify me to stock the line. On coil action parts I do a sizable business, where I can turn my inventory five times. I could not make that turnover with a complete stock of king-bolt sets. That's why I buy them from McQuay-Norris. That's why it is more profitable for me to buy Moog parts in the way I am buying them rather than go to a local warehouse and buy McQuay-Norris parts as a substitute. I can buy Moog parts cheaper, but sometimes it even pays us to pay a little more for it. That's why we pay for the

service of McQuay-Norris. I want to be paid for my functional service when I do that to other jobbers here in town just like Moog's people do it for me.

Q. You understand we are out to eliminate that?

A. You can't eliminate it. It is what the industry is built on (Part 3, Page 764).

Q. You had that in mind today when you testified?

A. No, just happened to come up, brought up the subject, and that's the way it came.

Q. Well, now, in buying Moog parts, you buy them outright, and resell them?

A. Yes, sir.

Re-Direct Examination.

I have testified that I ordered the goods from Moog and we paid for them by sending the payment to Cotton States, and at the end of the year I got my proportionate share of the volume rebate (Part 3, Page 765). As to how they figure the proportionate part I get, I do not know. They figure it on a proportionate basis less their operating costs. This 9% that is shown here on this exhibit is the 9% rebate that was received by Cotton States. It was not received by me from Cotton States. Evidently if Cotton States received 9% I would have received that amount less the operating costs of Cotton States. I cannot tell you whether the 9% is exactly right or not. That might be the figure, but I know I do not receive the entire rebate that Cotton States receives.

We do not manufacture any leaf springs or strip steel (Part 3, Page 766).

CLARENCE J. SPORL testified on behalf of the Respondent as follows:

Direct Examination.

My name is Clarence J. Sporl. I am the owner of Auto Chassis and Spring Company. We manufacture some leaf springs from raw strip steel.

Q. I call your attention to Government's Exhibit No. 62, an exhibit showing the purchases of coil action parts in New Orleans, Louisiana, from Moog Industries, Inc., for the years '47, '48 and '49. Auto Chassis & Spring—that is your company—doesn't show as having purchased any coil action parts from Moog for '47 and '48, but for '49 it shows that you purchased $318.26 for the year ending 1/31/50, and on which you paid (Part 3, Page 768) $296.30 for those purchases.

Now, for the year ending 1/31/49, Auto Spring & Brake Company purchased $6,192.69, with an allowance of 7½ percent or purchase price paid of 92½ percent of distributors' net price.

Now, Auto Shock Absorber, for the year ending 2/28/50, purchased $1,333.71, with a net allowance of 5.4 percent or 94.6 percent of distributors' net prices, while Greiner Auto Parts, for the year ending 12/31/49, bought $805.46 of coil action parts from Moog Industries, and paid therefor 91 percent of distributors' net prices.

Now, do you know, Mr. Sporl, whether for that period of time so shown on that exhibit, Auto Chassis & Spring Company was injured competitively in the purchase and sale of Moog coil action parts in New Orleans, by virtue of that differential from the distributors' net prices or difference in allowances?

A. No, it was not.

Q. It was not?

A. It was not hurt.

Cross Examination.

I base that statement on the fact that our volume is so low it could not hurt us any. Most of our work is retail (Part 3, Page 769).

Q. If you could have gotten a discount or could have bought at a cheaper price, would you have liked that?

Mr. Butterfield: Object as being rhetorical.

Trial Examiner Kolb: Objection overruled.

A. Well, we may have. I wouldn't say yes or no (Part 3, Page 770).

Our trade discount is important to us because we give a little trade discount, too. We pass it right on. We buy

direct from Moog according to the set price list, and did so in 1949. I am talking about coil action parts, the ones referred to on Commission's Exhibit 62. Some of our customers have a 2% cash discount. We do not regard our cash discount any more important than our trade discount. Both of them are important to us. In 1949 we received no trade discount on coil action parts.

At this point there was a discussion as to whether the witness knew what trade discount meant (Part 3, Page 771).

We bought from Moog Industries direct in 1949 and bought on what is called the "blue sheet" distributors' price list. On those purchases we got a cash discount of 2% and always took it.

Q. Did you get—apparently, from Commission's Exhibit 62, which Mr. Butterfield showed you, you got no trade discount—

Mr. Butterfield: Just a minute.

A. From my knowledge that blue sheet is what our trade discount—we have a markup.

By Mr. Schrup:

Q. That is the price you add to it when you resell it? (Part 3, Page 772.)

A. When you resell it, that's right.

Q. When you bought it from Moog did you get any discount from Moog other than the cash discount?

A. No.

Q. Now, would you have preferred to have gotten in addition to your cash discount what we call—whatever you want to call it—a trade discount or rebate or volume discount from the purchase price from Moog?

A. I'd prefer it if I had enough volume on it.

Q. Regardless of whether you had volume on it, you would still like to buy it at a cheaper net price than what you do now?

A. If possible.

Q. Why?

A. It would allow us to make a little more profit.

1949 was the first year we bought from Moog as we went in business the latter part of that year (Part 3, Page 773).

I do not know the prices which our competitors paid for Moog parts.

Q. And notwithstanding the fact that you do not know the prices which your competitors pay for Moog products in the New Orleans area, you still state you are not competitively hurt by your buying price.

A. No, I am not at the time.

Q. Will you explain that a little more fully? I don't quite understand that.

A. Well, you see, we started in the latter part of '49, which we really wasn't hurt. Most of our business is retail. We are doing front end work.

We re-sell very few Moog parts over the counter. I would say about 10% to a few garages. The balance of it is used in our own repair work (Part 3, Page 774).

Yes, other distributors are doing similar work in this area. We do not have a job price that we give to someone coming in to have repair work done; we have a set price.

Q. Would it be fair to state that the lesser price you pay for your merchandise that you use in your repair work would give you more profit in that work?

Mr. Butterfield: That is counsel's statement. That is counsel testifying; rhetorical.

By Mr. Schrup:

Q. That would help your business to grow and expand?

A. It would help the profits out a little.

Q. The more profit you make, the larger you would eventually grow and expand?

A. Yes (Part 3, Page 775).

In addition to purchasing coil action parts from Moog Industries, we also purchase leaf springs, coil springs and chassis parts. Our purchases of these were quite substantial. Referring to Commission's Exhibit 79-C, it shows our purchases for the period ending 7-31-50 of some $1,-

600.00, receiving a 5% discount. We also received a 2% cash discount on the products that we purchased that appear on Commission's Exhibit 79-C. We re-sold those products to independent garages. There were a few over-the-counter sales (Part 3, Page 776).

We have no salesmen. In selling to garages, they call in for the parts and we send them to them. Of course, I think I would have preferred to receive 14% discount, as it would help the profits and help the business. I would not say it would help us competitively.

Q. Mr. Sporl, you bought in the period ending 7/31/1950, approximately $1,800 or $1,600 worth of products, upon which you received a discount, volume discount, rebate, or whatever you wish to call it, of 5 percent, and I asked you whether you would have preferred to receive a discount of 14 percent instead of the 5 percent, and I believe you answered "Yes"?

A. Yes.

Q. Now if you had received that 14 percent discount, I ask you, would that not have helped you competitively? (Part 3, Page 777.)

Mr. Butterfield: I object to that question if Your Honor please.

Trial Examiner Kolb: Overruled.

A. No, I don't think it would.

By Mr. Schrup:

Q. Why not, sir?

A. Well, we have a set discount we give the trade. If we'd receive more, it would be to our benefit, our profits.

Q. I don't hear you.

A. It would be for our profits.

Q. The more profit you make, doesn't that help you competitively?

A. Well, it all depends. Do you mean if we are going to pass them on?

Q. No, no, no (Part 3, Page 778).

• • •

By Mr. Schrup:

Q. Mr. Sporl, if you bought your merchandise at a cheaper net price from Moog Industries, Inc., than you are now paying, would that help you in a business way?

A. Well—

Mr. Butterfield: I object to that question, if Your Honor please, for this reason: He is buying at a certain price from Moog now. As to what would happen if he bought it at a cheaper price is within the realm of speculation.

Trial Examiner Kolb: Objection overruled.

The Witness: Would you explain what you mean, how it would help me competitively?

By Mr. Schrup:

Q. Well, would you not grow a little bit, expand, give your customers a little better service?

Mr. Butterfield: I object to the counsel testifying.

By Mr. Schrup:

Q. Possibly invest a little more in your business, clean up your place, advertise a little more, things of that nature? (Part 3, Page 779).

A. It would help us out, but—

Re-Direct Examination.

By Mr. Butterfield:

Q. Do you buy on the blue sheet from Moog?

A. Yes.

Q. That blue sheet represents a trade discount price from list on every item that you buy?

Mr. Schrup: Just a minute. I don't think that question was framed properly.

A. Trade discount price from list?

Q. That's right.

Mr. Butterfield: Off the record?

Trial Examiner Kolb: The blue sheet is the price which Moog charges to its distributors.

Mr. Butterfield: That represents the price to the trade. It represents the trade discount from list.

Mr. Schrup: No.

Trial Examiner Kolb: There is no list.

Mr. Butterfield: Yes, there is.

Trial Examiner Kolb: You mean—

Mr. Butterfield: The suggested resale—

Mr. Schrup: Wait a minute, that is not—

Mr. Butterfield: If we could go off the record—

Mr. Schrup: I understand what you are driving at, but (Part 3, Page 780) that is not the fact. The blue list represents the purchase price by the jobber who buys direct from Moog, but that purchase price is subject to a discount depending on the amount of the purchases made by the jobber; his ultimate purchase price from Moog is the purchase price on the blue sheet less the discount.

Mr. Butterfield: In answer to counsel's statement, I wish to state this: The blue sheet represents in varying degrees from 55 to 60 percent trade discount off of net list.

Mr. Schrup: Wait a minute. The selling price of Moog is not the retail list price of Moog. They don't sell direct to the retailer. That is their suggested retail price (Part 3, Page 781). * * *

Q. What do you mean by the word "trade discount"?

A. I don't understand what you mean on that question about trade discount.

Q. Mr. Sporl, I show you Government's Exhibit 79(c) for the fiscal year during 1950; in leaf springs, coil springs and chassis parts for the year 1949—in leaf springs, Greiner Auto Parts purchased $1,898.74 worth of leaf springs, with an allowance of 4.79. Auto Chassis & Spring purchased $957.20 and Dealers Truckstell Company, Inc., purchased $1,526.39. For the year ending 12/31/50, on leaf springs, coil springs and chassis parts, Greiner Auto Parts purchased $3,373.71, with an allowance of 14 percent off of distributor's net prices. Auto Chassis & Spring purchased for the year ending 7/31/50, $1,687.68, with an allowance off distributors' net prices of 5 percent. Dealers Truckstell, Inc., purchased for the year ending June 30, 1950, $447.30 worth of leaf springs, coil springs and chassis parts, with an allowance of 5 percent off of distributors' net prices.

Do you know whether for the period so indicated on this exhibit Auto Chassis & Spring Company was injured competitively (Part 3, Page 782) by reason of the differences in allowances off of distributors' net prices for that period of time?

A. Competitively, I would say no.

Mr. Butterfield: That is all I have.

Re-Cross Examination.

By Mr. Schrup:

Q. When I examined you previously, we talked about two different discounts. We talked about 2 percent discount you received for paying cash for the merchandise, and we also talked about another discount that you received on your purchases, which we called either trade discount, volume discount, rebate, or whatever you want to call it. Now, referring to Commission's Exhibit No. 79(c), for the year ending 12/31/50, one of the buyers in New Orleans received a 14 percent discount; that is exclusive of the cash discount. That is the second discount we are talking about.

A. Yes.

Q. You received a 5 percent discount?

A. Yes (Part 3, Page 783).

Q. Would you not have preferred to receive the 14 percent discount?

Mr. Butterfield: I object, if Your Honor please.

Trial Examiner Kolb: Overruled.

A. I'd prefer to receive the 14, personally. for the business' sake (Part 3, Page 783).

New Orleans, Louisiana, October 28, 1952.

Trial Examiner Kolb: Are we going to go through the same testimony you had during the last three weeks? I mean are your questions—

Mr. Butterfield: I don't know, Judge. I don't know yet. After I have examined this transcript, there may be some line of questioning that may develop from this tran-

script that should be explored, and it may take a little different form.

Trial Examiner Kolb: Well, I don't see any occasion for spending any time at Memphis or Birmingham to ask witnesses whether or not they have been injured competitively, because of differing prices, which Whitaker or Moog may have allowed to their competitors. It seems to me like we are getting into cumulative testimony and wasting a lot of time for all of us in doing it (Part 2, Page 786).

Mr. Butterfield: Well, it may be that I can work out something with counsel where we could reach an agreement or stipulation in regard to the testimony.

Trial Examiner Kolb: Would you be willing to stipulate, Mr. Schrup, that if these witnesses were called at Birmingham and Memphis that their testimony in chief and cross examination would be substantially the same as that of the witnesses who were called in New Orleans, Dallas and Denver?

Mr. Schrup: Well, I would assume it would be. I would have no idea of who the witnesses were to be, but if the witnesses are to be jobber witnesses, I presume that the testimony of the jobber witnesses would coincide with the testimony of the other jobber witnesses who have appeared as witnesses in the records in both the Moog and Whitaker case.

Trial Examiner Kolb: Suppose we enter into that stipulation would it eliminate the necessity of calling these witnesses?

Memphis, Tennessee, November 19, 1952.

B. C. McKee, testified on behalf of Respondent as follows:

Direct Examination.

My name is B. C. McKee. I am the owner of McKee-Moog Spring Company. Moog Industries, Inc., has no interest in my company. I have been connected with my company since 1944.

Q. Mr. McKee, I show you Government's Exhibit No. 61 showing sales of Moog Industries, Inc., coil action parts to jobbers in Memphis, Tennessee, and is shown on this exhibit the year (Part 2, Page 790) 1947, J. B. Cook Auto and Machine Company for the year ending March 31 of that year purchased $1,884.99 of coil action parts from Moog Industries, Inc., at distributors net prices and received thereon a differential of 10 percent, $175.49 as shown on this exhibit.

The McKee-Moog Spring Company for the period ending 8-31-1947 is shown on this exhibit to have purchased $21,381.91 coil action parts at distributors' net prices with a differential of 15 percent or $2,985.89. Ozburn-Abston Company for the same year, for the year ending 12-31-47 is shown to have purchased $23,764.83 with differentials off distributors' net prices of 19 percent in the amount of $4,199.25.

Mills-Morris for the year ending 12-31-47 is shown on this exhibit to have purchased $7,846.79 of coil action parts at distributors' net prices of, with a differential of distributors' net prices of 19 percent amounting to $1,379.67.

In the following year, 1948, this exhibit also shows that J. B. Cook Auto and Machine Company for the year ending 3-31-48 is shown to have purchased $1,817.75 coil action parts from Moog Industries, Inc., at a differential of distributors' net prices of 10 percent.

From McKee-Moog Spring Company in the same period, same year ending 8-31-48, is shown to have purchased $9,267.80 at differentials of distributors' net prices of nine percent. The Ozburn-Abston Company for the year ending 12-31-48 is shown to (Part 3, Page 791) have purchased $24,482.59 of coil action parts from Moog Industries, Inc., with a differential of distributors' net prices of 19 percent.

The Mills-Morris Company for the same year ending 12-31-48 is shown to have purchased $4,004.78 cents of coil action parts from Moog Industries, Inc., at differentials of distributors' net prices of 19 percent.

For the year 1949 the J. B. Cook Auto and Machine Company is shown to have purchased $1,765.42 for the year

ending 3-31-49 at distributors' net prices with a differential of 10 percent.

McKee-Moog Spring Company for the year ending 8-31-49 is shown in this exhibit to have purchased $5,904.69 with differentials of distributors' net prices of seven and one half percent.

The Ozburn-Abston Company for the year ending 12-31-49 is shown to have purchased $9,775.62 with differentials of distributors' net prices of $1,729.21.

The Mills-Morris Company for the year ending 12-31-49 is shown to have purchased $1,662.56 of coil action parts from Moog Industries, Inc., with differentials off distributors' net prices of $247.51.

I also call your attention to Commission's Exhibit 79 showing purchases by Mills-Morris Company for the year ending June 30, 1949, of leaf springs from Moog Industries, Inc., of $2,815.33 with differential of distributors' net prices, 4.65 (Part 3, Page 793) percent.

The Ozburn-Abston Company having purchased, the same period of time, $10,293.12 of leaf springs from Moog Industries, Inc., at distributors' net prices with a differential of distributors' net prices of eight percent.

The J. B. Cook Auto and Machine Company purchased $615.31 of merchandise at distributors' net prices; the Dealers Truckstell Sales Company having purchased $5,960.41 worth of merchandise at distributors' net prices, and McKee-Moog Spring Company having purchased $23,675.81 at distributors' net prices, the last three that I have read having not received a differential of distributors' net prices in the purchase of these springs.

For the year ending or for the year 1950, Exhibit 79-F, I call your attention to the amount shown on here, Mills-Morris Company having purchased for the year 1950 $5,301.09 of leaf springs, coil springs and chassis parts from Moog Industries, Inc., there being no indication of which of these they purchased, but in that classification, at the differential off distributors' net prices of 14.96 percent.

The Ozburn-Abston Company purchased $14,881.31 of leaf springs, coil springs and chassis parts from Moog In-

dustries, Inc., with differential off distributors' net price of 14.99; J. B. Cook Auto and Machine Company having purchased for the year ending 6-30-50, $1,260.25 of leaf springs, coil springs and chassis parts at distributors' net prices with a differential (Part 3, Page 793) of 15 percent, and the Dealers Truckstell Sales Company, Inc., having purchased for the same period ending 6-30-51 $922.54 of leaf springs, coil springs and chassis parts with a differential of $46.13.

The McKee-Moog Spring Company purchased for the year ending 6-30-50, $26,230.04 with a differential off distributors' net prices of $3,409.91 as shown on this exhibit to amount to 13 percent.

Now, Mr. McKee, I ask you if as a result of the differentials from distributors' net prices shown on these exhibits, 61 and 79-F in the Memphis area in the purchase and sale of coil action parts, leaf springs, coil springs and chassis parts, do you know whether or not you were competitively injured by virtue of those differentials?

Mr. Schrup: I have an objection at this time. There is no proper foundation laid as to any conclusion on this witness as to any facts read to him. It is within the province of the Hearing Examiner to determine the very point in issue.

I would like to direct one question, if the Examiner please, to the witness in line with my objection to ascertain one fact if permissible.

The Witness: Shall I answer his question?

Trial Examiner Kolb: Just a minute. The question is simply whether or not he knows.

Mr. Schrup: Well, I think that is true, but if he (Part 3, Page 794) does or doesn't know, if you want to restrict the answer to yes or no and make a further question, I will reiterate my objection.

Trial Examiner Kolb: You may answer yes or no as to whether or not you know.

By Mr. Butterfield:

Q. Do you know whether or not by virtue of the figures and facts shown on these exhibits 61 and 79-F, as I have shown you, whether or not you know whether you were competitively injured by virtue of those differentials?

A. No, sir, none whatsoever.

Mr. Schrup: Just a minute, please. Don't be so anxious to answer.

Trial Examiner Kolb: The question calls for a yes or no answer as to whether you know.

The Witness: No, I wasn't injured.

Mr. Schrup: I move the answer be stricken and the witness be confined to answer yes or no whether he knew or not.

Trial Examiner Kolb: The answer may be stricken.

By Mr. Butterfield:

Q. Do you know whether you suffered an injury or not?

A. No, I didn't suffer.

Mr. Schrup: Just a minute. We aren't so interested in getting your answer you are making as we are to find out whether or not you have the knowledge, yes or no, whether you know, and at that time I would like to make my objection (Part 3, Page 795).

The Witness: You want to know what, now? What is your question?

Mr. Schrup: I think Mr. Butterfield has a question pending.

Trial Examiner Kolb: Mr. Witness, the question is directed to your knowledge as to whether or not you know, not whether or not you did or did not, but whether or not you know whether you did or not. That calls for a yes or no answer.

The Witness: Whether I know I was injured, that is the question he asked me, was I injured.

Trial Examiner Kolb: Do you know whether or not you were injured? You know or you don't know. He will ask you a further question on that.

The Witness: My answer still was no.

Mr. Schrup: I think the witness misunderstands the question.

The Witness: You asked me if I was injured.

By Mr. Butterfield:

Q I asked if you know whether or not you were injured.

A. Do I know whether or not I was injured?

Q. Yes.

A. The answer is I don't think I was injured. I don't see how I could be injured. I would say, whether I know whether I was injured or not?

Q. Yes, do you know?

A. I don't know as far as either way. I am not injured in any way. I mean, the question was asked, am I injured. We have, all the fellows are competitors.

Q. Who in your organization would know better than you whether you were injured or not?

A. Whether I was injured, in what way are you asking? Your question is whether or not I was injured?

Q. That is right.

A. No, I am not injured.

Mr. Schrup: I still move that answer be stricken and we have a yes or no answer to the question.

Trial Examiner Kolb: We will let the answer stand.

Mr. Butterfield: You may cross examine.

Trial Examiner Kolb: It is too complicated to get straightened out (Part 3, Page 797).

Cross Examination.

When I speak about buying prices I am referring to the cost sheet, the jobbers' sheet.

When I first became acquainted with these facts, I can't go right back to the year and tell you the exact year because I have been in business since 1944. Prior to Mr. Butterfield showing me the two Commission's exhibits, I knew the buying prices of each one of my competitors on those exhibits. I knew the discount that I got. I tried to find out what they got. As to whether I knew my competitors' exact buying prices after all the discounts were taken that were allowed by Moog, I knew there was a price schedule (Part 3, Page 798). I never tried to find out at what price my competitors were buying.

A. I guess I could have found out, but we just, in a competitor's in the parts end of it, we don't quote our cost on everything because we are all competitors. The

gentlemen's names that he put on there is my main competitors in this area.

Q. Well, did you know their— Coming back to the question I asked you, did you know their exact buying price?

A. The exact buying price?

Q. That is, after all the discounts were taken from the buying price that were allowed by Moog to your competitors?

A. Yes, I knew there was a price schedule on it, sure (Part 3, Page 798).

Q. Did you know what they were buying, at what price they were buying?

A. At what price they were buying?

Q. Yes.

A. I never tried to find out.

Q. Then, what do you base your statement that you weren't competitively hurt that you paid more in some instances than your competitors did?

A. I paid more?

Q. Yes.

A. I don't know I paid more because the deal that I had with them is my cost on it and they have a cost sheet and I don't see that I paid more.

Q. Are you interested in buying Moog products at the cheapest net buying price that you can obtain?

A. I am interested in buying anything cheaper, yes.

Q. Do I understand that it is your position that if your competitors buy Moog products at a cheaper net buying price than you do that you are not hurt thereby?

A. If my competitor is buying cheaper?

Q. Yes.

A. Well, I can answer that this way. I haven't been hurt.

Q. What do you base that on? Are you interested in buying your products as cheap as your competitors buy their products?

A. I definitely am, yes (Part 3, Page 799).

Q. If you pay more for those products than your competitors pay, you don't believe that hurt you?

A. I don't get where we are buying, paying more, because we have the same price schedule.

Q. You have the same list price but your net buying price varies depending on your volume discounts you receive from that list price?

A. I receive my volume discount as shown on the exhibit here, and I consider that I am buying it as cheap as I can possibly buy, because after all, I am a, I buy my things from Moog, and of course, I buy from other places. I am not 100 percent Moog jobber.

Q. That isn't the question, sir. I am not talking about any justification. I am asking you in purchasing Moog products for resale in the City of Memphis, are you interested in purchasing those products as cheaply as any other competitor?

A. Absolutely.

Q. Why is that?

Q. Yes.

A. Well, I couldn't answer that because I am not the biggest buyer down here.

Q. That isn't the question. You stated you were interested in buying as cheaply as any of your competitors buy for resale. Why are you interested? (Part 3, Page 800.)

A. I am interested in buying anything as cheap as I can buy it.

Q. Why is that?

A. Why is that?

Q. Yes.

A. You have more buying power, and anything you can buy cheaper, if I can buy a suit of clothes cheaper than another man for the same one—

Q. How does that help you?

A. How does that help me?

Q. Yes.

A. Well, I can make a few more dollars.

Q. That will help you competitively?

A. Any time you can make some more money it will help, yes, sir.

Re-Direct Examination.

By Mr. Butterfield:

Q. Mr. McKee, you don't buy all your leaf springs from Moog?

Mr. Schrup: Objected to as immaterial.

A. No, sir.

Trial Examiner Kolb: Objection sustained.

Mr. Schrup: I move the answer be stricken.

Trial Examiner Kolb: The answer is stricken.

By Mr. Butterfield:

Q. Mr. McKee, do you manufacture any of these springs yourself? (Part 3, Page 801).

A. Yes.

Mr. Schrup: I object to it as immaterial. Just wait a minute, Mr. Witness. Let me have an objection. It is immaterial.

Trial Examiner Kolb: I don't think that is proper re-direct examination.

Mr. Butterfield: I would like to recall him to ask that one question, if Your Honor please.

Trial Examiner Kolb: It is not material as to whether or not he makes his own springs, makes part of them and buys from somebody else.

Mr. Butterfield: The complaint as I understand it is directed to what is called the primary and secondary line, and the reason I would like to recall him to ask this question is because I can demonstrate by his answer that he is also a spring manufacturer and he is not, as it would indicate from these exhibits, merely a jobber or wholesaler. He manufactures in competition.

Mr. Schrup: I have an objection. It has been going on all through the case. Mr. Butterfield puts on a witness and examines partially and Mr. Butterfield wants to put him back on for re-direct examination. I don't think it is an orderly procedure.

Trial Examiner Kolb: The objection is sustained.

Mr. Butterfield: I understand my offer of proof is (Part 3, Page 802) rejected?

Trial Examiner Kolb: You had an opportunity to put the man on and get the information you had. Then you turn over for cross examination. Now, your re-direct examination is beyond the scope of the cross examination. If this was an isolated instance, I wouldn't say anything about it. It has been happening time and time again, and it is time it has to stop. If you want to examine him, let's examine him and turn him over for cross.

Mr. Butterfield: If the Examiner please, on cross examination I made no objection whatever. The cross examination was much broader than the direct examination I had made. Because of the broadness of the scope of the cross examination I asked for permission to recall the witness to offer proof that he too is a spring manufacturer.

Trial Examiner Kolb: I have ruled on the objection.

Mr. Butterfield: And my offer of proof is rejected?

Trial Examiner Kolb: Yes (Part 3, Page 803).

JAMES A. WILLIAMS testified on behalf of the Respondent as follows:

Direct Examination.

My name is James A. Williams; I am auditor and supervisor of dealers Truckstell Sales Company in Memphis since 1945.

Q. I call your attention to Government's Exhibit 78 showing sales by Moog Industries, Inc. as shown on your exhibit, Dealers Truckstell Sales, Memphis, Tennessee, the year ending June 30, 1949, $5,960.41 and sales for the year ending 1950, $922.54, a differential off distributors' net prices of five percent and New Orleans, Louisiana, for the year ending June 30, 1949—the year ending June 30, 1950, sales of leaf springs, coil action, from Moog Industries, Inc. $536.29 and for the year ending June 30, 1950, $447.30, differentials off distributors' net prices of five percent, and I ask you, does the Dealers Truckstell Sales Company, Inc., still maintain a store in New Orleans (Part 3, Page 804) Louisiana?

A. No, sir.

Q. How many stores do you have at this time?

A. One.

Q. That is located at Memphis?

A. Right.

Q. When did you close your store at New Orleans?

A. Actually the remaining inventory was shipped in September of 1950 back to Memphis. We began proceeding to close it in June of 1950 and we were away from there by September 30, 1950.

Q. Mr. Witness, I show you Government's Exhibit 61 purporting to show coil action sales, Moog Industries, Inc. in the Memphis area for the years 1947, 1948, 1949. This exhibit shows that J. B. Cook Auto and Machine Company purchased for the year ending 3-31-47, $1,884.99 of coil action parts from Moog Industries, Inc. differential off distributors' net prices of 10 percent. McKee-Moog Spring Company for the year ending 8-31-47 purchased $21,381.91 with differential off distributors' net prices of 15 percent and the Ozburn-Abston Company for the year ending 12-31-47 purchased $23,764.83 of coil action parts off distributors' net prices from Moog Industries, Inc. differential off distributors of 19 percent. The Mills-Morris Company having purchased for the same period of time, the year ending 12-31-47, $7,846.79 of coil action parts from Moog Industries, Inc. with a differential off distributors net prices of $1,397.06. The (Part 3, Page 805) following year, 1948, this exhibit shows that J. B. Cook Auto and Machine Company for the year ending March 31, '48, purchased $1,817.75 of coil action parts from Moog Industries, Inc. with a differential of 10 percent, and the McKee-Moog Spring Company for the year ending 8-31-48 purchased $9,267.80 of coil action parts, a differential of nine percent of distributors' net prices.

Ozburn-Abston Company for the year ending 12-31-48 purchased $24,482.59 with a differential off distributors' net prices of 19 percent.

The Mills-Mooris Company for the year ending 12-31-48 purchased $4,004.78 with a differential off distributors' net price of 19 percent.

For 1949 J. B. Cook Auto and Machine Company, the year ending 3-31-49 purchased $1,765.32 coil action parts from Moog Industries, Inc., with a differential off distributors' net price of $1,643.60.

The McKee-Moog Spring Company for the year ending 8-31-49 purchased $5,904.69 with a differential off distributors' net price of $412.30.

The Ozburn-Abston Company purchased for the year ending 12-31-49, $9,775.62 with a differential off distributors' net price as shown on this exhibit of 19 percent while the Mills-Morris Company for the same period of time is shown to have purchased $1,661.56 with differential off distributors' net price of $247.51 (Part 3, Page 806).

I also call your attention to Government's Exhibit 79-F showing sales of leaf springs for the year ending June 30, 1949, Mills-Morris Company, $2,815.53 with a differential off distributors' net price of $131.05. The Ozburn-Abston Company purchased $10,293.12 with a differential off distributors' net prices of $823.45 while J. B. Cook Auto and Machine Company purchased in the same period $615.31 as shown on this exhibit from Moog Industries at distributors' net price.

Dealers Truckstell Sales, Inc., purchased $5,960.41 at distributors net price, and McKee-Moog Spring Company purchased $23,675.81 for McKee-Moog Spring. For the year ending 12-31-50 Mills-Morris shown on this exhibit purchased $5,301.09 with a differential off distributors' net prices of 14.96 percent. Ozburn-Abston is shown to have purchased for the same period of time $14,881.31 with differential off distributors' net price of three one-hundredths of one percent more than Mills-Morris Company.

The J. B. Cook Auto and Machine Company is shown on this exhibit to have purchased for the year ending June 30, 1950, $1,260.25 at distributors' net price with a differential of 15 percent; Dealers Truckstell Sales Company having purchased for the year ending 6-30-1950 leaf springs, coil springs and chassis parts as shown on this exhibit at distributors' net prices $922.24 with a differential of five percent.

The McKee-Moog Spring Company for the same period of time is shown to have purchased $26,230.04 with a dif-

ferential (Part 3, Page 807), off distributors' net prices of 13 percent.

Now, Mr. Witness, I ask you whether or not you know whether Dealers Truckstell Sales Company, in the purchase and sale of parts of the Moog Industries, Inc., whether or not you know if the company was competitively injured by virtue of the differences in the differentials allowed at the distributors' net prices to the persons shown in these exhibits.

Mr. Schrup: I ask the witness to answer that question yes or no.

Trial Examiner Kolb: The question will be answered yes or no as to whether or not you know.

The Witness: May I ask a question of you?

Trial Examiner Kolb: Yes.

The Witness: In his question he mentioned parts; I mean, my understanding of parts, I take that to mean small components and not as I understand it—The only purchases we have made and the only ones I have ordered and checked have been overload springs. That is the only ones that we have any knowledge of, is overload springs. It is a unit to us. It is not as a part. I wanted that one thing clear.

Trial Examiner Kolb: I think he is referring to parts and that comes in the general phase.

The Witness: All right.

Trial Examiner Kolb: The question is whether or not you know; not whether or not you are injured, but whether or not (Part 3, Page 808), you know whether or not you were injured.

A. Yes, I would know.

By Mr. Butterfield:

Q. Were you so injured?

Mr. Schrup: I have an objection, calling for an improper conclusion on the part of the witness. I don't believe there is any proper foundation laid for any testimony of that nature in the absence of any showing as to how or what this witness knows about the buying prices of his

competitors not being used in a differential of buying prices they obtained over this witness' firm.

Trial Examiner Kolb: The witness says he knows. That qualifies his answer as to whether or not he knew properly would be a question for cross examination. Objection overruled. He may answer.

By Mr. Butterfield:

Q. What was the company, how was the company injured by virtue of the differentials?

A. We were not to my knowledge.

Q. Mr. Witness, did you sell all the merchandise you ordered from Moog Industries?

A. Yes, sir, we did.

Mr. Butterfield: You may cross examine.

Cross Examination.

By Mr. Schrup (Part 3, Page 809):

Q. When you state you were not competitively injured to your knowledge, what did you mean, Mr. Witness?

A. I mean that the only thing we can possibly know is what we know and we know we were not.

Q. How do you know you were not? You make a statement—

A. Because we know what we know.

Mr. Butterfield: I object.

Trial Examiner Kolb: Overruled. It is proper cross examination.

By Mr. Schrup:

Q. What do you base it on?

A. Because we know what we know.

Q. Give us the facts upon which you base your conclusion. Relate to us why you come to that conclusion.

A. There were no instances—you are talking about this period in here?

Q. I don't know. Yes, during that period. You were the one that stated you were not competitively hurt.

A. Does he relate to this question? He pointed to a period of June 30, 1949, and fiscal year 1950. We had no

instance, there was no instance came to our attention whereby we were injured.

Q. Well, what do you mean by that, no instance came to your attention?

A. Competitively (Part 3, Page 810).

Q. Explain that.

A. I think if we were injured, do you not think we would know it?

Q. That is what I am questioning you about, whether you would or would not. Tell me what facts you base it on.

A. On the fact that we were not injured. To our knowledge, we were not injured just as I stated.

Q. You still leave me in the dark on what part you base it.

Mr. Butterfield: You will always be in the dark.

By Mr. Schrup:

Q. You stated you were not competitively injured. Tell us the facts on what you base that conclusion.

A. I base that conclusion on the fact that we had no injury brought to our attention.

Q. What do you mean by injury?

A. What do I mean by injury?

Q. Yes.

A. Any effect competitively. There was no effect competitively.

Q. How do you know? How do you know what your competitors did with their better buying price?

A. I didn't say I did (Part 3, Page 811). * * *

A. I thought I had answered. I think if anyone would know it we would know it.

By Mr. Schrup:

Q. Mr. Witness, I don't want to argue with you. You come in (Part 3, Page 812) and say no, you were not hurt. I say what led you to that conclusion, what facts?

Mr. Butterfield: I submit the witness answered the question and that question was if anyone knows if he was injured or not he would know it.

Trial Examiner Kolb: The witness has not answered the question. He has not stated what constitutes competitive injury in his mind and what effect that has on his business.

Mr. Butterfield: I think he already answered that he sold all the merchandise he ordered.

Trial Examiner Kolb: That is not an answer to the question. Maybe he could have sold more or ordered more.

The Witness: I think we probably could have ordered if we had sold more. We didn't carry all the stock.

Mr. Schrup: I still think there is a question pending.

By Mr. Schrup:

Q. I am interested in finding out the fact on which you base your conclusion.

A. That we were not injured?

Q. Yes.

A. The books and records of Dealers Truckstell Sales would show that we had no instance. Our territory men had no instance to report to us whereby they had ran into any complication that was caused by our price, our purchase price. That is one (Part 3, Page 813) thing. Another thing, the books and records of Dealers Truckstell Sales will show you that all the purchases we made were sold. We had no dead stock. We did make a profit. It will also show you that approximately .0065 percent of our sales are made up of purchases made of Moog Industries. That is a negligible amount to us, and therefore we are not interested. That is a small part of our business and it would not affect us competitively, no.

Q. Let me follow you through. You base the fact that you paid more for Moog products than some of your competitors, but it didn't hurt you competitively because the amounts you purchased were rather small compared to your other lines. is that right?

A. That is true.

Q. You also state you ran into no instances where your competitors used their cheaper buying price to undersell your selling price to respective customers, is that right?

A. That is right.

Q. You also state that you made a profit on Moog that was satisfactory to you?

A. That is right.

Q. Now, when you state that you were not hurt competitively; do you have an opinion that because your volume of purchases is not as great as your competitors, therefore you are not entitled to buy at the same price that your competitor is? (Part 3, Page 814).

A. Would you repeat? Did you ask if I had an opinion?

Q. Yes.

A. Would you repeat the question?

Q. Yes. Do you have an opinion that because your volume of purchases of Moog products for resale is not as great as some of your competitors that therefore you are not entitled to buy at the cheaper net price they pay for merchandise?

A. My opinion is that on volume basis, if we purchased as much as we are entitled to buy as cheaply as our competitors (Part 3, Page 815).

By Mr. Schrup:

Q. You feel that—

A. In fact I know that to be a fact because our contract so reads.

Q. If you have a competitor offer you for resale that buys in greater volume than you do, do you feel that you should get the same buying price that he has. Is that what you base your opinion on that you weren't competitively hurt?

A. No, sir, I base my opinion, as I explained to your question asking what I based it on, I based it on three things: One, that we had no instance in the field whereby any of our men reported that we were affected competitively.

Q. You mean by that no instances where resale prices as suggested by Moog were not observed?

A. Would we be affected any other way competitively except in the retail sales field?

Q. I have an opinion. I am trying to find your opinion, what you base it on. If you will continue—

Mr. Butterfield: He has the facts.

Mr. Schrup: He may have the facts but conclusions on those facts may be erroneous. That is what we are trying to find out.

Mr. Butterfield: You have had 12 years or more.

Trial Examiner Kolb: Let's discontinue the side remarks and let the witness answer the question (Part 3, Page 816).

By Mr. Schrup:

Q. Would you continue, sir? I think you told us once, that the reason you state you are not competitively hurt is that you have not observed any of your competitors using their better buying price to undercut their resale by Moog?

A. That is true.

Mr. Butterfield: Is this on direct examination?

By Mr. Schrup:

Q. The second one?

A. All our purchases had been sold. We had no desire to carry a large inventory.

Q. In buying products for resale, are you interested in buying those products as cheaply from Moog as any of your competitors in the City of Memphis?

A. We are interested in buying them on the same basis as our competitor.

Q. Well, by that you mean, as I am trying to understand you, if your competitor buys in greater volume, do you believe he is entitled to a better buying price from Moog than, for instance, you buying lesser volume?

A. You are asking for an opinion; you said could I believe?

Q. Yes.

A. It is my opinion he would be entitled to a better buying price, yes, sir.

Q. Why do you say that? (Part 3, Page 819.)

A. That is a general business practice.

Q. Then you are basing your statement, then, that you are not hurt competitively because of the fact that Moog

products had volume discounts and that a competitor of yours who buys in greater volume than yours is entitled to buy at a cheaper price than you do, is that correct?

A. Yes, sir, because the same price is available to me. We can buy in volume if we want and get that same price.

Q. Well, of course you could buy from another competitor, too, and buy it cheaper if you wanted to, perhaps, or pay more for your merchandise.

A. We might.

Q. Now, let me ask you this. You are interested in buying Moog products at the cheapest net price you can, are you not?

A. Well, we have agreed to buy them at a contract price, yes, sir.

Q. That isn't the point.

A. Maybe I misunderstood your question. Maybe I did, I don't know.

Q. Let's look at the exhibit here. Now, according to 79 of various of your competitors get discounts ranging 14.96, 14.99, 15, 13 and you bought at 5 percent. Now, would you prefer to buy your products or do you desire to buy your products at 14.96, 14.99, 13 instead of 5 percent?

Mr. Butterfield: I object to that question, if you (Part 3, Page 820) please. It is purely rhetorical.

Trial Examiner Kolb: Overruled.

A. The records would indicate that we did not choose to buy our products and obtain the volume discount because we did not desire to carry the inventories.

By Mr. Schrup:

Q. Let's forget about the volume discount. No justification by Moog as yet on volume discount. In purchasing the $5,960.41 of products for resale from Moog in the year 1949, Mr. Witness, upon which you bought at 5 percent discount, would you have preferred to buy that amount at let us say 15 percent discount?

Mr. Butterfield: Same objection, if Your Honor please.

Trial Examiner Kolb: Overruled.

A. Naturally, I think anyone would have preferred to if they would have desired to carry the inventories required if they made that purchase.

Q. Why would you prefer to buy at 15 percent rather than five percent off the buying price?

A. Why would we have preferred to buy it?

Q. Yes.

A. Anyone would like to buy anything as cheaply as they could.

Q. Why, sir?

Mr. Butterfield: I object.

A. I think it is the desire to obtain your own possessions, hold on to what you have, not pay out any more than you have to (Part 3, Page 821).

By Mr. Schrup:

Q. In buying products cheaper, does it help you competitively?

A. Does it help us competitively?

Q. Yes.

A. Are you speaking generally of McKee-Moog purchases?

Q. Make your own choice, Mr. Witness.

A. As related to Moog purchases, I would say no. As related to other purchases, say of Truckstell where we do a volume business, I would say yes.

Q. Well, now, you always confine by saying—I am asking you on the basis of what you have bought for resale for the year 1949, if you had bought those products at a lesser buying price than what you actually paid, would that have helped you competitively?

A. I don't believe that it would.

Q. Why not?

A. Because we are not affected competitively.

Q. I am trying to get the answer why would not the fact that you could buy your merchandise cheaper than you bought it not help you competitively?

A. Because we sold all that we bought. Why would we buy more and let it lay in a warehouse?

Q. I am not interested in what you sold more or less. I am asking you this: if you make more profit than you are making now, would that help you competitively? (Part 3, Page 822).

A. If we make more profit?

Q. I am not trying to trap you. I am trying to find out.

A. I am trying to give you a direct answer too. Will you repeat your question, please?

(The reporter read the question as follows:

"Question: I am not interested in what you sold more or less. I am asking you this: If you make more profit than you are making now, would that help you competitively?")

A. I think if you make more profit any time that it would help you.

Q. And if you bought Moog products for resale at a cheaper price than you are presently paying for that, wouldn't that help you competitively?

A. If we bought Moog products at a cheaper price than we are paying now, would that help us competitively? Yes, sir. Any profit would help us competitively I stated before.

Q. Now, following that last statement that you made, and having the evidence before you that your competitors paid less for Moog products for resale than you did, why do you state that you are not hurt competitively?

A. Why do I state that?

Q. Oh, sir—

Mr. Schrup: Read the question back to him.

(The reporter read the question as follows:

"Question: Now, following that last statement (Part 3, Page 823) that you made and having the evidence before you that your competitors paid less for Moog products for resale than you did, why do you state that you are not hurt competitively?")

Mr. Butterfield: I object to that question, if Your Honor please. This has been gone over and over and over again here and he has given the answer.

Trial Examiner Kolb: This is cross examination.

Objection overruled.

A. The first reason is that we had no complaint from the field that we were injured competitively. The second reason is that we would not desire to carry additional in-

ventories and the third reason is that we sold all of the merchandise which we purchased.

By Mr. Schrup:

Q. I realize you have given those reasons, but they don't square with your statement.

Mr. Butterfield: I object to the characterization of the witness' testimony by counsel as to his opinion. In my opinion it does square.

Mr. Schrup: The witness has just stated on the record that it would help him competitively to buy Moog products for resale at a lesser price than what they paid. Now the witness says that although his competitors paying a lesser price pays for the same products for resale, that it (Part 3, Page 824) does not hurt him competitively. Now, I ask him to reconcile those two statements.

Mr. Butterfield: He has already stated that he ties it up in inventory.

Mr. Schrup: Mr. Butterfield, I am not interested in your opinion. I am interested in the witness'.

Mr. Butterfield: You told the witness you were interested in whether he sold—

Trial Examiner Kolb: Let the witness testify.

A. If we had made more money on Moog products, we would not have tied it up in additional Moog products. We would have tied it up in other inventories. We have had uses for money.

Q. Would that help you competitively?

A. In another line of business, probably; not in the Moog business.

Q. It would help you in over-all business?

A. That is true. Any profit would, as I stated before.

Mr. Schrup: I think that is all.

Re-Direct Examination.

By Mr. Butterfield:

Q. Mr. Witness, you stated that your purchases of Moog products for the period covered amounted to .0065 or sixty-five one thousandths of one percent of your sales, is that correct?

A. Yes, sir. that is right.

Mr. Butterfield: That is all (Part 3, Page 825).

Re-Direct Examination.

I believe I stated that my purchases of Moog products for the period covered amounted to .0065 of one percent of our sales.

Re-Cross Examination.

Our profit on every line that we handle contributes to our overall business health (Part 3, Page 826).

November 20, 1952, at Memphis, Tennessee.

MISS U. V. BOLAND testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Miss U. V. Boland and I am Secretary-Treasurer of Mid-South Distributors, Inc. I have been connected with that company since June, 1934.

The witness was shown Commission's Exhibit 61, showing coil action sales to Mills Morris & Co., Memphis, Tennessee, for the year ending December, 1947, with a rebate of $1,397.06, and was asked whether she knew Mills-Morris Company to have received this rebate amount from Moog Industries. The witness answered that Mills-Morris had not received that amount (Part 3, Page 828), but that Mid-South had received from Moog on account of sales to Mills Morris of coil action parts, leaf springs, coil springs, and chassis parts for the year ending in December, 1947, a rebate of $2,817.20; that Mid-South Distributors did not distribute that amount of money to Mills-Morris Company. The witness was then shown the same Commission's Exhibit, showing Mills-Morris Company to have received a rebate of $708.41 on coil action sales for the year ending December, 1948, and was asked if Mills-Morris & Company had received that amount of money from Moog Industries. The witness stated that Mills-Morris & Company had not received that amount of money

from Moog Industries, but that Mid-South Distributors had received on account of sales to Mills-Morris & Company for the year ending December, 1948, on coil action, leaf springs, chassis parts, and coil action parts, $1,616.74, and that that amount of money was not paid over to Mills-Morris & Company (Part 3, Page 829).

The witness was shown Commission's Exhibit 61, showing that in 1949 Mills-Morris Company reportedly received on coil action springs from Moog Industries on December 31, 1949, $247.51 rebate, and was asked whether Mills-Morris had received that amount of money. The witness replied they had not; that Mid-South had received from Moog Industries on account of sales to Mid-South Distributors, shipped to Mills-Morris & Company for that period, on coil action parts, chassis parts and leaf springs, $1,300.50; that Mid-South Distributors did not pay that amount over to Mills-Morris & Company.

Cross Examination.

By Mr. Schrup:

Q. I will show you Government's Exhibit 61, Miss Boland. As I recall it you were examined by Mr. Butterfield on purchases of Mills-Morris of coil action parts for the years '47, '48, and '49.

A. Not purchases; volume discount is the figures that were given.

Q. Well, now, the years '47, '48, 49, Chart 61, Government's Exhibit 61 discloses Mills-Morris purchased $7,846.79 for 1947, and that brought for the volume discount, how much?

A. That figure combined with the figures on leaf springs (Part 3, Page 830), coil action parts and chassis parts brought to Mid-South $2,817.20.

Q. How do you arrive at that figure, by adding the total purchases on chart 61 and—

A. No, sir, by actual discount received.

Q. I am talking about purchases. You lump your volume discount on purchases of coil action sales and rebates and the volume discount?

A. Volume discount is not figured on lump purchases. It is figured on the different items because they carry a different schedule.

* * *

Q. Yes. Well, now, let me ask you this: Mills-Morris would be no exception on purchases from Moog Industries; whatever would apply to Mills-Morris would apply equally well to all the members of the group?

A. That is correct.

Q. Taking Mills-Morris as an example, will you tell us, then (Part 3, Page 831), how the discounts are computed on purchases from Moog of the various products of Moog?

A. According to the schedule in which their total purchases arrive on each class of merchandise.

Q. Well, as I understand it, you received a volume discount each month from Moog on all the purchases of the group?

A. No, sir.

It works out semi-annually, based on the aggregate year's purchases of all the group. We receive a volume discount in a lump sum. That volume discount is allocated out to the various members according to the purchases of each class of merchandise (Part 3, Page 832). The same rate of discount applies to all the purchase figures.

Q. But if Mills-Morris purchased fifty thousand dollars and another member purchased only twenty-five thousand dollars, a proportionate share of Mills-Morris of that volume discount would be greater, would it not?

A. Of that discount, yes.

The entire discount that is received by Mid-South is not remitted in its entirety to the members. Before remittance is made to the members, we take out the expense of operating the group and after that is done, each of the members proportionately bears the expense of his operation of the group (Part 3, Page 833), and is distributed according to earnings. The greater the member's earnings are, the greater portion of expense he pays. His earnings are based on purchases, and by "earnings" I mean the discount received on purchases made through Mid-South

(Part 3, Page 834). Mid-South Distributors has five employes (Part 3, Page 835). They have a Manager, a Secretary-Treasurer, two bookkeepers, and a warehouse man (Part 3, Page 836).

The warehouse was established in February of 1952, and the operating expenses consist of salaries to those people, office rent, and incidentals. Without the figures in front of me, I cannot approximate what the yearly operating expenses would be for the years 1949-1950.

Yes, I was a witness yesterday in the case against Mid-South. The witness was then handed a document entitled "Mid-South Distributors, Memphis, Tennessee, certified statement" and was asked if that refreshed her memory. The witness stated that it did refresh her memory, but could not give him a percentage figure, but from it could give him the gross amount of expenses, which was $34,-700.00 for the year (Part 3, Page 837). This document is a statement of a certified public accountant for Mid-South (Part 3, Page 838).

At this point Counsel for Respondent objected that this was truing the case of the Commission against Mid-South, in that Commission's counsel was asking what the total amount of discount received from all manufacturers of Mid-South on purchases were for that particular year, and objected thereto, and was overruled (Part 3, Page 840). For the year 1935 through 1950 the entire volume discounts received from all sellers by Mid-South amounted to $3,173,582.59. The operating expenses were $274,805.63. The net earnings allocated to the various members of the group amounted to $2,898,776.96. The fiscal year of Mid-South ends on June 30th (Part 3, Page 841).

Q. To further clarify your testimony, I show you the same document which is the Oliver P. Cobb and Company Certified Accountant statement. This is your document. That chart shows the distribution of earnings after deduction of operation expenses to the various members of Mid-South for the fiscal year ending July 15, 1950. What purchases does that, what period of purchases does that cover?

A. That would cover purchases from July 1, 1949, through June 30, 1950, which we pay for on the tenth.

Q. And according to that, after the deduction of operating expenses there is a pro rata or there is a distribution of volume discounts to the various members which was made at three times during the year 1950?

A. Yes, sir.

Q. Now, would I be correct in stating that during the year 1949 that fourteen members of the Mid-South Distributors, Inc., purchased Moog products?

A. Fourteen members during that month, so that would mean during the year, yes, sir.

Q. Would I also be correct in stating that the purchases amounted to $96,463.63?

A. No, this is a calendar year.

Q. Oh, I see. Could you tell us what the purchases would have been? You wouldn't know that, I suppose, without consulting your records?

A. No, I don't have that.

Q. On the purchases they made, taking for example, 1949, you described to us you received a volume discount from Moog on the total amount of purchases?

A. Yes.

Q. After the deduction of operating expenses which are, of course necessary to the operations of the group, the balance of that volume discount was then distributed to the purchasers?

A. Yes, it was paid to the members according to these figures.

Q. Now, with reference to the exhibits which Mr. Butterfield has shown you and your statement that the amounts shown on those exhibits were not paid over to the various members purchasing Moog products, that sum does reflect the amount that would have been paid over prior or in the absence of the deduction of any operating expenses of the group?

Mr. Butterfield: I object to that as highly speculative as to what would have been paid over if the government has demonstrated there were deductions from those figures so it would have been impossible to pay over those amounts, and she so testified those amounts were not paid over. As to what would have happened—

Trial Examiner Kolb: She testified the amounts were not paid over. We want to know what was paid over. Objection overruled (Part 3, Page 843).

By Mr. Schrup:

Q. You may answer, Miss Boland.

A. Those amounts less operating expenses; not those amounts.

Q. Not the amounts shown on the charts?

A. That is right.

Q. Those amounts less the operating expense of the group was the sum that was paid over?

A. Yes.

Q. And the operating expenses and so forth, are such as you have testified to?

A. Yes, sir.

* * *

Mr. Schrup:

Q. You were questioned, Miss Boland, by Mr. Butterfield, with reference to Commission's Exhibit 61, and did you state that the figures on Commission's Exhibit 61 were incorrect?

A. He asked me whatever the figure is over there is what we received.

Q. Referring to which column, please, that shows rebate of Mills-Morris of $1,397.06?

Mr. Butterfield: She testified that Mills-Morris did (Part 3, Page 844) not receive that.

Mr. Schrup: Wait a minute. Let the witness testify and not you, Mr. Butterfield.

A. And this figure—

By Mr. Schrup:

Q. You referred to $2,817.20 which does not appear on the chart.

A. That is right.

Q. Which is a figure you testified to?

A. As taken from our records.

Q. What is that figure?

A. Of the amount received from Moog on all purchases, I don't have it broken down according to—

Q. Now, that is, let me get it straight if I understand you. The entire amount of volume discounts received from Moog Industries for the year 1948 on the purchases of all members of Mid-South Distributors amount to $2,-817.20; is that what you mean to state?

A. Well, I lost you there because you had the wrong year. 1947 purchases for Mills-Morris and their branches. I can't give you the figures that the purchases amounted to but we received on their purchases of various items $2,817.20.

Q. Well, now, in order that we won't be misinterpreted by examination on direct, coil action sales, this chart is to coil action sales and the rebate on coil action sales is the (Part 3, Page 845) amount of $1,397.60. Is that figure of $2,817.20 you testified include any other products than shown on that chart?

A. It does.

Q. Well, obviously that couldn't be correct examination direct by that chart because that chart is confined to coil action figures. $20,016.20 could not refer to coil action sales but includes also other parts, does it not?

A. This figure covers other items, yes, sir.

Trial Examiner Kolb: But that figure is correct as to coil action parts?

The Witness: I don't have that broken down.

* * *

Q. In other words, coming back to Commission's Exhibit 61, Miss Boland, as it stands, and confined only to coil action sales and rebates, the figures on that chart as you understand (Part 3, Page 846) it are correct?

A. I can't say that because I have no way of checking. We don't keep the accounts separated.

* * *

Q. Now turn over to Commission's Exhibit 78. Now, that takes care of leaf springs, coil springs, and chassis parts but 61 is only coil actions, so that wouldn't be of any help to us, or would it?

A. The dates don't seem to agree. This is 50 and this is 49.

Trial Examiner Kolb: Try 50.

The Witness: I don't have 50 on here.

By Mr. Schrup:

Q. Well, Miss Boland, let's come back to Commission's Exhibit 61 in view of all this confusion. You testified as to three sums, I believe, whether your 1947, if I recall correctly it was $2,817.20. For the year 1948 it was $1,-616.74 and for the year 1949 it was $1,300.57, is that correct? (Part 3, Page 847.)

• • •

By Mr. Schrup:

Q. Were those the figures you testified to, Miss Boland?

A. They were, yes.

Q. What did those figures represent that you testified to?

A. Volume discount received from Moog Industries by Mid-South on purchases.

Q. Of Mills-Morris Company.

A. Shipped to Mills-Morris Company or their branches.

Q. What products do those figures embrace?

A. All of the merchandise that was shipped.

Q. And they included coil action but were not restricted to that. It included also leaf springs, et cetera?

A. That is correct.

Trial Examiner Kolb: It is not your contention that (Part 3, Page 848), the figures appearing on Commission's Exhibit 61 showing the sales or purchases of Mills-Norris and discounts received through Mid-South is not correct?

Mr. Butterfield: There is a contention and that was the purpose of introducing this witness to show that those figures were not correct.

Trial Examiner Kolb: Then you admit you are trying to foul up this record?

Mr. Butterfield: Your Honor please. I am attempting to defend. The Government's Exhibit on coil action parts as prepared by Mr. N. C. Steel, and after that case prepared

and in the middle of this case Mr. Steel decided he wanted to try something else. He prepared a series of charts which no one on earth can find out what those charts mean and all I can do to defend myself against them is to show the charts Mr. Steel prepared reflecting payments so much percentage of discounts to Mills-Morris are not correct and the witness so testify.

Trial Examiner Kolb: Your accountant did not so testify. You are testifying now. Your accountant did not testify. These charts admitted in evidence.

Mr. Butterfield: Our accountant did not testify.

Trial Examiner Kolb: Submitted to your accountant. He went over them. There was no objection raised. I don't propose to have any argument with you on this matter right now. If you want to prove up this chart is incorrect let your (Part 3, Page 849) witness bring in the record and show it is incorrect.

Mr. Butterfield: I would like to recall to Your Honor, if your Honor please, at the time these charts were introduced into evidence, I made vigorous objections to these charts and despite every objection I made all the objections were overruled. The things I attempted to show in those charts as incorrect were ignored and those charts admitted in evidence and nothing I could do to help myself.

Trial Examiner Kolb: Are you trying to prove the coil action figure is wrong? Let your witness bring in the figures now and show it is wrong. I am not going to put up with that kind of practice before me. I think it is reprehensible.

Mr. Butterfield: How else can I prove it, Your Honor?

Trial Examiner Kolb: Let your witness come in with her figures and show that figure is wrong. The chart on its face shows it applies to only one particular phase of the purchases. You come in and have the witness say that the amount received was so much including other things. Then you make a statement to me this chart is wrong. I am not going to take that kind of practice before me.

Mr. Butterfield: If Your Honor, please—

Trial Examiner Kolb: Unless you want to bring in your witness, I am going to strike the entire testimony this morning (Part 3, Page 850).

Mr. Butterfield: May I have a five minute recess?

(A short recess was taken.)

Trial Examiner Kolb: On the record.

Miss Boland, you were shown Commission's Exhibit 61 which was made by an accountant for the Commission who testified in this proceeding and purports to show the amounts of discounts which were paid to Mid-South on the Mills-Morris Company account for the years 1947, '48 and '49 covering coil action sales only. Now, as I understand it, first, your records do not break down the coil action sales and the sales of leaf springs and other items which are sold by Moog Industries upon which this account is paid.

A. That is right.

Q. And when you testified that a discount of $2,817.20 was received for the year 1947 and $1,616.74 for 1948 and $1,300.57 for 1949 on the Mills-Morris account, you are testifying that that was the total discount received on all items received.

A. That is correct.

Q. Now the fact that this particular exhibit, 61, shows an item of $1,397.06 for 1947, $708.41 for 1948 and $247.51 for 1949, that would be included in the amount which you testified to as having received?

A. Yes, sir.

Q. And as far as you know those figures could be correct?

A. They could be, yes (Part 3, Page 851).

Mr. Butterfield: May I ask one question?

Trial Examiner Kolb: All right.

Re-Direct Examination.

By Mr. Butterfield:

Q. These figures to which you have just testified do not reflect the, they include but do not reflect the payments made to Mills-Morris? By that I mean the payments by Mid-South to Mills-Morris were figures less than the figures shown on this chart, is that correct?

A. That is correct, it would be less.

Q. Do you have those figures that were paid to Mills-Morris on account of these payments received by Mid-South that you have testified to?

A. No, sir, they are intermingled with others.

Re-Cross Examination.

By Mr. Schrup:

Q. In other words, the figures that are shown on Commission's Chart 61 reflecting a discount, a column, discount received on Moog Industries on the purchases of Mills-Morris, I believe shows the figure of $1,397.06 for the year 1947 which reflects the rebate of 19 percent. You state that Mills-Morris receives from Mid-South a lesser sum than $1,397.06?

A. Let me say it this way: those are gross figures and our cost of operation is deducted from gross volume discount.

Q. That is right (Part 3, Page 852).

A. Which would actually make it less.

Q. That is right. In other words, so it would be clear for the record. Commission's Exhibit 61, the amount of rebate of $1,397.06 received on the purchases of Mills-Morris is the amount that would go to Mills-Morris except for the deduction of operating expenses of Mid-South Distributors' operation.

A. That is correct, assuming that figure is what we would have.

Mr. Butterfield: I wish to call your Honor's attention to the fact that this Exhibit 61 does not reflect or does not refer to and says nothing about sales to Mid-South Distributors. It is entitled coil action sales and rebates to jobbers in Memphis, Tennessee, and it says Mills-Morris Company having received 19 percent rebate.

Trial Examiner Kolb: As I understand that exhibit shows the rebate which was earned by Mills-Morris. The testimony, I think, is very clear that that was not paid to Mills-Morris direct but paid over to the Mid-South Distributors and by them redistributed to Mills-Morris subject to a deduction to cover expenses.

Mr. Butterfield: The operating expenses, that is correct (Part 3, Page 853).

January 12, 1953, at New York, New York.

ABRAHAM L. TREITMAN testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Abraham L. Treitman. I am Secretary-Treasurer of American Motor Specialties. The witness was shown Commission's Exhibit Number 64, referring to coil action sales and rebates to jobbers in New Jersey. American Motor Specialties is designated on the exhibit as a jobber in 1947, 1948, and 1949. That is the same as a wholesale distributor (Part 3, Page 856). American Motor Specialties does not buy from Moog Industries but did buy from Metropolitan Automotive Wholesalers. That was the Cooperative. In 1947 on this same exhibit there appears Wheels, Inc., American Motor Specialties Company, and Clinton Square Auto Parts. In 1948 there appears Wheels, Inc., Alfa products, American Motor Specialties, and Clinton Square Auto Parts.

Q. I ask you, Mr. Treitman, to study this exhibit showing these sales and rebates, and I ask you if, by virtue of any of the differentials shown in rebates or commissions or differences on this sheet, whether you know if American Motor Specialties was injured competitively in its re-sale of the coil action parts of Moog Industries, Inc., for the years indicated.

Mr. Schrup: I ask that there be a yes or no answer.

A. No. The same as it was in the other case.

Q. And by "No" you mean that you were not injured competitively by reason of the differentials shown on this sheet? (Part 3, Page 857.)

Cross Examination.

With reference to Commission's Exhibit 64, Clinton Square Auto parts is a member of Metropolitan Whole-

salers. According to this schedule, Commission's Exhibit 64, I cannot point out any customer listed thereon who purchased Moog coil action parts as cheaply or cheaper than the two group members shown thereon.

Q. Directing your attention again to Commission's Exhibit 64, it reflects that American Motor Specialties Company and Clinton Square Auto Parts Corporation did buy at the best net price, the coil action parts from Moog Industries, Inc., is that not so? (Part 3, Page 858.)

* * *

A. I don't know if that is the best price or not, but according to these figures, they show a better percentage. (Pause) Yes, according to this exhibit (Part 3, Page 859).

We purchased Moog Products through the Metropolitan Group. That was the situation in 1949. Prior to our association with that group we purchased Moog products directly from them (Part 3, Page 859).

We stopped purchasing direct from them when the Group was organized. Our purpose in buying from the Group was to get a better price. Moog's salesman calls on us. As to how many times a year he calls, I cannot tell you definitely. I don't see him all the time.

We had two branches in operation for a period of years, and I am opening another one to-day. The two branches are at 57 Park Street, Orange, New Jersey and 717 Lyons Avenue, Arlington, New Jersey. They are independent of the main store location, which is at 53 Lock Street, Newark, New Jersey (Part 3, Page 860). We cover a radius of about ten miles from the main store. Newark is the center of our trade area. We sell to garages, service stations, car dealers, and fleet operators and very few jobbers. We sell no Moog products to jobbers nor did we sell any in 1949. We have six salesmen who cover the entire territory (Part 3, Page 861). All of them operate and report out of our main store. As to our method in the purchase of Moog products, we maintain a perpetual inventory, and by going through our records, we find out what we are short and we place an order with Metropolitan Automotive Wholesalers Cooperative and they in turn pass the

order on to Moog. We use an order blank form furnished by Metropolitan Automotive Wholesalers headed with their name (Part 3, Page 862). The orders are written up by our inventory clerk in our office. To my knowledge the Moog salesman has never written up an order for us. We send the order in to Metropolitan Automotive Wholesalers and they in turn pass it on to Moog. Moog ships the merchandise direct to us, but it is billed to Metropolitan Automotive wholesalers, and we get a copy of that billing (Part 3, Page 863). The bill indicates the price at which the merchandise has been shipped. At the end of the month we take all of Moog's invoices and list them up on the form, together with other merchandise that we have purchased from the Cooperative and we send one check in to Metropolitan Automotive Wholesalers Cooperative less 2% discount. That is within thirty days. We remit to Metropolitan Automotive Wholesalers on the basis of the billing price from Moog. Moog bills to us at their distributors' price list, and we take off 2% for cash in remitting to the Cooperative Group. We receive back a dividend from the Group. The basis of this dividend I do not know. We have been receiving dividends from Metropolitan ever since we have been doing business with them. I have never questioned the amount, as we have no way of figuring it, because I don't know. As to our advantage in buying through the group, as contrasted with our other method of direct purchase, I am under the impression that in the long run we fare better by buying through the group. That is because we periodically get the dividend that is declared, which I presume is based upon our purchases from Moog Industries (Part 3, Pages 865, 866). The difference in the two methods of buying, one before the Group was organized and one after, is that before the group was in existence we placed our orders direct, subsequently we placed our orders with the Group. Under either method we received the merchandise direct from Moog (Part 3, Page 866).

Re-Direct Examination.

Q. Mr. Treitman, I call your attention here to Commission's Exhibit 64, and these (indicating) amounts here,

$600.71 for 1949, and $1,798.56 for 1948, and $607.91 cents, 1947.

Now, those amounts shown on this sheet were not received by American Automotive Specialties Company, were they?

A. Not direct.

Q. So that, from looking at this exhibit, it may be that you are actually getting a worse price than a best price, as shown on this exhibit?

Mr. Schrup: Just a moment. That is not proper redirect. We do not contend that these are the amounts actually received, because it is obvious that that amount would not be received on the basis of the group discount. We do admit that there are some operating expenses that have to be deducted. It is our point that whether they are taken up by the group before the group passes the money, or that the money is passed over and then repaid by Mr. Treitman, is immaterial. We are interested in the comparative price at which he buys this merchandise as compared with other purchasers.

By Mr. Butterfield:

Q. This net price, Mr. Treitman, doesn't it represent the (Part 3, Page 867) actual price that you paid for Moog merchandise?

A. No, I don't believe so. (Pause) I wouldn't know. I have no records with me to disprove it or to prove it.

Mr. Mayer: The answer was "I don't know."

The Witness: That's right.

By Mr. Butterfield:

Q. And you admit that these are not the prices at which you purchased these—

Mr. Schrup: These are the prices which this member of the group paid for his purchases. Now, the fact, as I said before, whether the group deducts the operating expenses and remits the balance to the witness, or whether the whole is turned over to the witness, and he deducts part of the operating expenses and remits the balance then to the group, is immaterial. The fact is, he gets the discrimination.

By Mr. Butterfield:

Q. Mr. Treitman, this American Motor Specialties, for instance, for 1949 shows $3,116.63. Then, on rebate is shown here $600.17. And this amount (indicating) $2,560.92. That figure does not represent what you paid over, but this figure (indicating) $3,161.63 represents the figure? That is the figure that you sent?

A. That's right.

Q. Since you have been a group member, have you paid anything direct to Moog Industries? (Part 3, Page 868.)

A. No.

Q. Have you ever gotten anything back direct from Moog Industries?

A. No (Part 3, Page 869).

Re-Cross Examination.

I have not examined our books and records to determine whether the figure Net Sales $3,395.97 on Commission's Exhibit 64 is correct. I have no personal knowledge of the figures existing under the net amount column of $3,116.63. I understand that on our purchases Metropolitan receives a rebate of some kind from Moog Industries. I do not know how much that rebate is. I understand that a proportion of that rebate which is declared is included in the settlement by the group, yearly.

By Mr. Butterfield:

Q. Do you know personally, from your own knowledge, that there is no figure on that sheet which correctly represents any amounts of purchases direct from Moog Industries, Inc., for the years 1947, 1948, and 1949?

Mr. Schrup: I object to that question. The chart was put in by the accountant based on the records of Moog Industries. If there is any question as to the correctness of that chart, the proper party to be examined on that chart is the accountant, or to bring in some evidence from Moog Industries to dispute the chart, which is in evidence, and not to ask this witness, who says he diesn't know anything about the records.

Mr. Butterfield: At the time that that chart was prepared, the accountant knew that the Moog records to

which he had access did not reflect any such thing as you show on that chart.

Hearing Examiner Kolb: All this exhibit shows, according to the testimony we have had, is, that certain rebates were paid to the association or the group.

Mr. Butterfield: It doesn't show that at all.

Hearing Examiner Kolb: The testimony shows that that was the situation, and the accountant figured out the (Part 3, Page 870) rebate which would come to your customer on the basis of the rebate received from the group.

Mr. Butterfield: Without any deductions for operating expenses.

Hearing Examiner Kolb: With no deductions for operating expenses with no deductions for operating expenses. Mr. Schrup's position, as I understand it, is that these are the correct amounts, exclusive of the costs of the operation of the group.

Mr. Butterfield: As I understand it, he is throwing the burden of the respondent to prove his case.

Hearing Examiner Kolb: The only question involved is whether or not the discount received by this man can be considered as a gross discount received by the group, or whether, in payment to the group, the expense is not to be considered as part of his rebate.

Mr. Butterfield: The Robinson-Patman Act, Section 13 thereof, provides that nothing in the Act shall prevent a cooperative association from returning to its members the whole or any part of the net earnings or surplus resulting from its trading operations in proportion to their purchases or sales through the association—

Hearing Examiner Kolb: Now, Mr. Butterfield, what has that got to do with the examination of this witness? Isn't that something that you want to argue at the close of the case? (Part 3, Page 871.)

Mr. Butterfield: You see, I have never been able to pin the Government down as to just what exactly they are charging us with in this case. I have never been able to pin them down. Now they are charging us with selling to a cooperative, where the cooperative is specifically exempt under the Act.

Mr. Schrup: Mr. Butterfield, the purchases in this case were purchases made by these members purchasing through this office, this buying office as an agent.

Mr. Butterfield: That would be true of any cooperative, as I see it (Part 3, Page 872).

January 13, 1953, New York, New York.

SAMUEL BUDOFF testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Samuel Budoff. I was connected as a partner of Automotive Distributors in 1949.

Q. I show you Government's Exhibit 68, showing sales in Brooklyn, New York, and shipment by Moog Industries, Inc. to eight different wholesale distributors. This chart, Commission's Exhibit No. 68, shows the contract year and the year previous to it stated in this first column, and this column, the third column over, shows the net shipments, and (Part 3, Page 874) then the amount of the cash discount in the other column, and in the fifth column is the excise tax, and in the sixth column is the net amount, and in the seventh column is the rebate, with percentages in the eighth, and net payment received by Moog Industries in the ninth column, and then, in the last column, percentage of net amount.

Now, from these figures that are set up here, Mr. Budoff, with these differentials as shown here in these percentages and amounts received, and the differentials in the amounts shipped to these various parties, do you know whether or not by virtue of those differentials, your company was competitively injured in the year 1949?

Mr. Schrup: Objection. I don't believe there has been any proper foundation laid up to this time for any testimony on the part of this witness to that effect.

Hearing Examiner Kolb: Objection overruled.

Mr. Mayer: We also ask that the witness be instructed to answer yes or no.

Hearing Examiner Kolb: Answer yes or no.

By Mr. Butterfield:

Q. Do you know whether you were competitively injured?

A. No, I don't believe I have been.

Q. By that you mean that you have not been competitively injured?

A. No (Part 3, Page 875).

Cross Examination.

The first time I saw the chart, Commission's Exhibit 68, in this case was when the gentleman was over in the store —the man who left the subpoena. My partner told me about it. I was not there. I found out about the various buying prices, as shown on Commission's Exhibit 68, when my partner told me about the different discounts. I have been acquainted with the various buying prices of these various companies. I know that various companies, as shown on this exhibit, were receiving lower prices than I was in 1949, but they are bigger operators and I know they buy much more than I do (Part 3, Pages 876, 877). I know that they were buying lower than I was. I know they were buying at these precise figures in 1949 because I believe the figures are what I believe them to be because when you buy certain amounts you get a certain percentage and when you reach another bracket you get another percentage. I knew that and I was satisfied with the bracket that I was aiming for. I do not know how much these other various companies were purchasing. I only know from the amounts of contracts of merchandise that are to be bought.

I am familiar with K and G Auto Parts Company. I would not know what they purchased in 1949 (Part 3, Page 877). I cannot tell you approximately what I thought they purchased in 1949; I would not know.

Q. Now, Mr. Budoff, what do you understand competitive injury to mean?

A. I wouldn't know anything. All I was interested in was the contract that I had, and if I reached a certain amount, I was to get an extra 5 percent, and what the

other fellow did, or how much he bought, I wouldn't know, I wasn't interested. I didn't know whether I was being hurt or I wasn't being hurt. I was just minding—

* * *

(Part 3, Page 880.)

By Mr. Mayer:

Q. I believe you stated that you didn't believe that you were competitively injured. What I am trying to find out is what do you understand competitive injury to be?

A. I can't really tell you whether—what the injury might have been. All I know is that I have been satisfied with what I have been getting, and I don't believe, personally, that I was injured in any way at all.

Q. If you don't believe so, what would be an idea of injury you might suffer?

A. I don't think I suffered any injury.

Q. I realize that you say you didn't suffer any injury, but what would you consider injury? What do you mean by injury?

A. By financial injury. I know I have been satisfied with what I have, and that's all there is to it.

Q. Can you give me an example of what you might mean by injury?

A. When you talk "injury" you mean financial injury, right?

Q. Yes. Give me an example of what you mean by injury.

A. My business has been running profitably, and that's all I know. I don't know about the other fellow, whether he is making money or whether he is not making money, or buying for less or for more, I don't know. I'm only interested in what I am buying.

Q. Are you interested in buying your merchandise at the cheapest net price available? (Part 3, Page 881.)

A. Yes, we are.

Q. Why is that?

Mr. Butterfield: If your Honor please, I object to that question as being a question which contains within itself

its own answer. It is obvious that anyone would be willing to buy as cheaply as possible, and sell as the market would stand. I think that that is the business—

Hearing Examiner Kolb: Overruled.

By Mr. Mayer:

Q. Why is that, sir?

A. Why is what?

Q. Why would you like to buy at the cheapest net price available?

A. Every business man likes to buy as cheap as he possibly can, and I believe that the contract we have with Moog was at the cheapest price, and there's a scale there, that's all. The more you buy, the bigger the discount is.

Q. Do I understand, then, that you feel that if you buy as much as your competitors, that you are entitled to the same price that they receive? Is that correct, sir?

A. I assume that that would be the right thing, according to the contract. They have a scale of the purchases and the discounts. It's up to each individual man to try to sell as much as he can to attain the highest purchase.

Q. I direct your attention to Commission's Exhibit 68 which shows the net sales to Automotive Distributors in the amount (Part 3, Page 882) of $2,478.36, and the net sales to K & G Auto Parts, for example, of $1,228.13. Yet it shows the net buying price—

Mr. Butterfield: If your Honor please, at this time I wish to interpose an objection. Counsel knows that Moog Industries, in the year 1949, sold no products to K & G Auto Parts. They were sold to Metropolitan Automotive Wholesalers Cooperative, and that these figures on this are not the figures of sales to K & G, but are the figures of sales to Metropolitan Automotive Wholesalers Cooperative. Counsel knows that. The sheet does not show it. The sheet, at the time it was put in, was designed to be highly prejudicial to Moog Industries, Inc. It involves another respondent who is under complaint here, and it is an attempt to try that case within the confines of this case. Now, this figure on here (indicating) of sales to K & G—and I didn't ask him on direct examination of sales to K & G, it was shipments to K & G, and, I repeat,

that is an issue which is involved in another complaint. And these figures taken from here, like K & G, and A. Jacoby and Sons, I think those were combined purchases shipped to these people and charged and paid for by the Metropolitan Automotive Distributors, and those are the ones with whom Moog Industries had dealings, and therefore I think that asking a question like that is outside the scope of this direct examination that I made, and it is outside the scope of this inquiry, and it is highly prejudicial to the Moog Industries case, because it is untrue as shown on (Part 3, Page 883) this exhibit, and we shouldn't be bound by tactics of that kind. That is the reason why I am making this objection at this particular time.

Mr. Schrup: We take exception to counsel's statement. We have gone over this matter innumerable times, if your Honor please, and counsel still makes the same objections. We have established that K & G Auto Parts has purchased and handles Whitaker products, and did so during—

Mr. Butterfield: If your Honor please, I object to that statement. Counsel has not established any such thing in this case. This is an issue that is in the complaint which you have against Metropolitan Automotive Wholesalers, and you haven't even tried that case yet. • • •

This argument has nothing to do with the objection to the question. I will overrule the objection. Have you completed your question?

By Mr. Mayer:

Q. The chart shows the net buying prices of Automotive Distributors to be 95 percent of the list price of the Moog products. It shows the K & G Auto Parts Company to pay 11 percent of the list price of the Moog products.

Now, I ask you if you wouldn't like to have purchased (Part 3, Page 884) your Moog products in 1949 for 81 per cent of the list price as shown that the K & G Auto Parts Company purchased in that year?

Mr. Butterfield: I object to that question as carrying within itself its own answer. It is the same kind of question as to whether you would like to buy your merchandise cheaper.

Mr. Schrup: If your Honor please, Mr. Butterfield has been overruled time and time again on the specific ob-

jection that he has been making, and we cannot continue our examination.

Hearing Examiner Kolb: Objection overruled.

A. If those figures are correct, of course I would like to be receiving a lower discount, like this K & G, but from what I heard, just now, this K & G is a part of some kind of a group. I don't belong to that group, so therefore I couldn't very well expect the same kind of a discount.

By Mr. Mayer:

Q. Even though your own purchases almost double the purchases of this particular purchaser?

A. So I see. But, as I said before, I don't belong to that group, so therefore I couldn't see where I could get a discount like that.

Q. Directing your attention again, Mr. Budoff, to the purchases of Automotive Distributors, which is $2,478.36, 1949, and shows that you received a 5 per cent rebate upon (Part 3, Page 885) these purchases, I ask you would you rather have received the 19 per cent discount or rebate upon those purchases?

Mr. Butterfield: I object to that question on the same basis.

Hearing Examiner Kolb: Overruled.

A. Well, of course, I would rather receive it, if I were a member of that group. But I am not a member of the group.

Q. The question was, would you rather receive 19 per cent or 5 per cent?

A. Of course, the 19 per cent.

Q. Why would you rather receive 19 per cent.

A. It's more profitable to receive 19 per cent.

Q. Is that profit, your profit that you receive on those transactions important to you?

A. Very important.

Q. And isn't it important to you in your competitive scheme?

A. I imagine it would be, I imagine it would be.

Q. Why would you say that it was competitively important to you?

A. Well, of course, it's more profitable, more profit attached to each individual sale.

Q. And that enables you to stay competitive?

A. To stay competitive and to do good financially (Part 3, Page 886).

* * *

Hearing Examiner Kolb: On the record.

Do you have any further witnesses, Mr. Butterfield?

Mr. Butterfield: Not this morning.

Hearing Examiner Kolb: You have no witnesses for this afternoon?

Mr. Butterfield: None for this afternoon.

Hearing Examiner Kolb: I think we might as well take up, on the record, the question as to whether or not you intend to close your case tomorrow.

Mr. Butterfield: Can we take that up tomorrow, Judge?

Hearing Examiner Kolb: We can discuss that today, if you will.

Mr. Butterfield: I have been so busy on this thing that I haven't had any opportunity to go over that.

Mr. Schrup: I think we should have an answer to that problem. We have had some extensive hearings through Dallas and Denver, and other cities, including Memphis, and we have run into this situation, recurrently, of putting one witness or possibly two witnesses during a day, and then going on to the next, and then having it delayed before the next hearing, and I think we should be entitled to know Mr. Butterfield's position.

Mr. Butterfield: I am sorry that Mr. Schrup is accusing me. We have had in New York the last four or five days some of the most terrible weather conditions that I have (Page 887) ever encountered. We have a bus strike that is on here in New York at the present time, and it has been terrific for me to get around and serve these various subpoenas. I have been at this thing 16, 18 and 19 hours a day, getting around from hither to yon in this situation, and that is an abnormal thing here, that I have no control of. I am sorry it happened.

Mr. Schrup: I understand that in the other cities the Whitaker and Moog salesmen have already contacted these jobbers and prepared them for this.

Mr. Butterfield: They have not contacted these jobbers and prepared them for this district at all. The only thing that has been done here is myself serving these subpoenas. Nobody else had anything to do with it.

Hearing Examiner Kolb: Is it your intention to close tomorrow after you have completed the testimony of the several witnessses you are going to have tomorrow morning?

Mr. Butterfield: No, I don't intend to close tomorrow morning, because I have a section of the country that I haven't even touched, really two sections of the country that haven't been touched. There is the West Coast and the Mid-West Des Moines, Iowa, area.

Mr. Schrup: I would suggest that if the same type of testimony that you have put on in the matter here is the type of testimony that you will put on in these other areas, it is both a waste of your client's money and the Government's money, too, and I object on the part of the Government (Page 888).

Mr. Butterfield: Do you want to withdraw any of these exhibits?

Mr. Schrup: We certainly do not withdraw anything.

Mr. Butterfield: Do you want to enter into a stipulation that these people will all testify that they have not been injured?

Mr. Schrup: We will enter into a stipulation with you that the type of testimony that has been given so far by these jobbers, would be repeated by the other Jobbers, for what it is worth.

Mr. Butterfield: It is this question of injury. Could you stipulate that these people who have testified that they haven't been injured—

Mr. Schrup: Mr. Butterfield, we will stipulate to this effect: We will stipulate with you that if you called other jobbers to the witness stand, that on direct examination and cross-examination they would testify as they have been testifying in the past hearings.

Mr. Butterfield: That each and every one of them will testify that he has not been injured?

Mr. Schrup: I will certainly let the testimony stand, and let the Hearing Examiner, and not you, judge the value of the testimony, Mr. Butterfield. That is what you have been trying to do all along.

Mr. Butterfield: Oh, no. They have testified that they haven't been injured, and if you would stipulate (page 889) with me on that—

Mr. Schrup: I will stipulate with you, Mr. Butterfield, that the testimony that will be brought forward by any jobber witnesses that you put on the stand, would be the same type of testimony that the previous jobbers have given. I say it is a waste of time to go and just put cumulative testimony of this kind on the stand, because it is the same testimony we will get at any other hearing we will go to.

Mr. Butterfield: I am just trying to work out something.

Mr. Schrup: I don't think we should have all this time-wasting going on. I don't think the Government should be put to the expense of having these witnesses put on the stand to repeat the same kind of testimony. We are agreeable that the testimony to be forthcoming will be the same as the testimony in the past.

Mr. Butterfield: Will you stipulate that these people that I put on would testify that they have not been injured?

Mr. Schrup: Mr. Butterfield, I will stipulate with you that they would testify the same as they have testified, for whatever that testimony means. I will not stipulate with you as to a conclusion that is neither for you nor me to judge.

Mr. Butterfield: But every witness on this stand (page 889a) has testified that he has not been injured. Will you stipulate that?

Mr. Schrup: I repeat, I will not stipulate as to what the meaning of the testimony is. I will stipulate that the testimony will be the same. It is neither for you nor for me to decide what the meaning of that testimony is. That is the Hearing Examiner's province.

Mr. Butterfield: But they have testified that they haven't been injured.

Hearing Examiner Kolb: Mr. Butterfield, if you stipulate that the testimony will be the same, isn't that what you are talking about? As I understand it, counsel for the Commission is willing to stipulate that if further witnesses, jobber witnesses, are called, their testimony, both on direct and cross-examination, will be substantially the same as the testimony that has been introduced in the past several hearings, where jobber witnesses have been called.

Mr. Butterfield: Let me think that one over. Will you read that back for me, Mr. Reporter?

Hearing Examiner Kolb: Read my last comment, please.

(The reporter read the Hearing Examiner's comment as follows:

"Hearing Examiner Kolb: Mr. Butterfield, if you stipulate that the testimony will be the same, isn't that what you are talking about? As I understand it (Page 890) counsel for the Commission is willing to stipulate that if further witnesses, jobber witnesses, are called, their testimony, both on direct and cross-examination, will be substantially the same as the testimony that has been introduced in the past several hearings, where jobber witnesses have been called.")

Hearing Examiner Kolb: Off the record.

(Discussion off the record.)

Hearing Examiner Kolb: On the record.

Are you willing to accept a stipulation which has been offered by counsel for the Commission, that the testimony of additional jobbers, if called, would be substantially the same as the testimony of those jobbers who have already testified in this proceeding, both as to direct and cross-examination?

Mr. Butterfield: May I first consult with the principals in the case before I make that kind of an agreement?

Hearing Examiner Kolb: We will have a recess for a few minutes.

(A short recess was taken.)

Hearing Examiner Kolb: On the record.

Mr. Butterfield: I talked with Mr. Whitaker in Kansas City, and he is not satisfied with this testimony that we have had here, which excepts the West Coast. Now, he does want that West Coast situation in this record, and (Page 891) as long as he is paying for it, why, I suppose we will have to get it in there. He doesn't want to rest without this West Coast stuff in the record now.

Hearing Examiner Kolb: All that West Coast testimony will be exactly the same as we have been getting here, will it not?

Mr. Butterfield: No, there is a little different situation on the West Coast than here. Moog doesn't get across there at all because of the freight differentials out there, and they don't go beyond the mountains on their stuff. Whittaker does, because he has a lot of airplane material.

And that West Coast situation is a little peculiar, compared with the rest of the United States. There is a different kind of market out there. Now, it's that market that he wants to get testimony on, in this record. As you understand, Mr. Whitaker does not feel that he has done anything illegal or wrong in this thing, and, of course, I agree with him. And any conclusions that we might arrive at will have to be based on the record for these representative areas in the United States, and I have just got to spot-check these areas.

Hearing Examiner Kolb: We have covered several areas, and the testimony, so far, has been exactly the same in each one, including the witnesses here in New York. And it seems to me that any testimony of additional jobbers would be more or less cumulative and, if it is, others would be no (page 892) occasion for taking it, particularly when you have an offer of a stipulation which would eliminate the taking of that testimony. Now, I don't know about the West Coast or what the situation is there. If the situation there is similar, I assume that what you would do is put jobbers on the stand, show them the prices on the charts, and ask them if they have been competitively injured, and they would say no. Then we would go in on cross-examination to the question of competitive injury, and so forth, as they have done with all the rest of the witnesses, and it would be almost a complete record of what we have had in the past.

Mr. Butterfield: No. There are different aspects on the West Coast because marketing there is different on the West Coast than it is in this part of the country.

Hearing Examiner Kolb: In what way is the marketing different?

Mr. Butterfield: In the first place, you have, out on the West Coast—there have been many industries that have moved out there and established plants. The West Coast, as you know, is an area that has been tremendously built up in population in the last few years, and the whole—well, as you know, prices change west of the Rockies.

Hearing Examiner Kolb: Mr. Butterfield, suppose that you have made your defense on these areas which you have covered, then there would be nothing gained by making a further defense as to the West Coast. If you haven't made (page 893) your defense on the areas covered, it would be of no advantage to make a defense on the West Coast, would it?

Mr. Butterfield. Now, if the Government would want to withdraw that West Coast material, if they want to withdraw that material—but they have nothing to gain by the West Coast material if they have got everything that they want on this already, and they have nothing to lose by striking out this West Coast material.

Mr. Schrup: No, we stand on the record. As I understand it, what you are talking about is the Whitaker case, and as far as the Moog case is concerned, you are willing to enter into a stipulation.

Mr. Butterfield: No. On the Moog case, I want that Des Moines, Iowa, area, because that is an area that could be representative of the whole Mid-Western area. You see, we haven't taken the Middle Western area at all.

Mr. Schrup: Well, we have offered you a stipulation, and I think the Examiner has distinctly stated what it would be.

Mr. Butterfield: Depending on those two hearings. It may be that after the conclusion of those two hearings we could enter into a stipulation.

Mr. Schrup: We have had some considerable off-the-record discussions about these matters, and it always seems

like "Just one more time". That could go on interminably (page 894).

Mr. Butterfield: I have made my statement on those two areas on the record.

Hearing Examiner Kolb: We have discussed this at the last hearing.

Mr. Butterfield: There was no understanding that I knew of.

Hearing Examiner Kolb: Wait a minute. You said that you wanted to take a sample of the New-Jersey-New York area.

Mr. Butterfield: That is right.

Hearing Examiner Kolb: (Continuing) And I assumed, on that statement, that you planned to finish up. Now, this West Coast proposition comes as quite a surprise to me.

Mr. Butterfield: I distinctly talked to Mr. Schrup about this West Coast area.

Mr. Schrup: I don't recall, Mr. Butterfield. I seem to remember at the time that you wanted to go to Memphis and Birmingham, and then we could conclude. We had a hearing in Memphis, and then you come around with the fact that you want a New Jersey hearing, because that was an unusual situation. Now that we have had that, now we have another situation.

Mr. Butterfield: The first town that I wanted to go to was Birmingham. I never was able to get to Birmingham. I never was able to get a hearing down there. Then I told you in Memphis at the last hearing that Whitaker would (page 895) have to cover this West Coast area. I told you that distinctly at Memphis.

Mr. Schrup: I don't recall that. It was my impression that we would have the New Jersey area, Bronx and New York, because that was unusual, and that would probably be the last hearing. Now, something else comes up. It is up to the Examiner to rule on it. We made our offer as to what we would stipulate, and you do not seem to find it acceptable. It is up to the examiner to rule as he sees fit. Maybe we can go off the record for a minute (p. 896).

January 14, 1953, at New York, New York.

ALBERT SAPIRO testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Albert Sapiro and I am connected with Sapiro Auto Parts Company, New Brunswick, New Jersey.

Q. Mr. Sapiro, I show you Government Exhibit No. 63, Moog Industries, Inc., being Coil Action Sales & Rebates to jobbers in Newark, New Jersey, for New Brunswick for the years 1947, 1948 and 1949, showing sales to Motor Parts & Machine Company, Sapiro Auto Parts Company, and it also has on the chart a distributor by the name of Clinton Square Auto (Part 3, Page 898) Parts Corporation. The testimony in the record heretofore is that Clinton Auto Square Parts Corporation pays for its material through the Automotive Wholesalers Cooperative, that is, Moog business is done through the Automotive Wholesalers Cooperative. The chart indicates differentials of sales made to Jobbers, as Motor Parts Machine Company, and it also indicates shipments to Clinton Square Auto Parts Company, Newark. I will ask you to examine this chart and tell me whether or not you know whether Sapiro Auto Parts Company was or was not competitively injured by virtue of the differentials in rebates shown on that chart?

Mr. Schrup: We have the same objection we have had heretofore.

Hearing Examiner Kolb: Objection overruled.

A. As far as I can say, we in Sapiro Auto Parts Company more or less mind our own business, and we are not interested in what Clinton Square Auto Parts gets, or what they do, because there seems to be enough business in the territory for all of us, and we all get our share of the business, and we all make our profit.

Q. Do you know whether or not you were injured competitively by virtue of these differentials?

A. Not as far as I know, no.

Q. By "not as far as you know" you mean that you were not injured competitively?

A. That is right (Part 3, Page 899).

Cross Examination.

Yes, I am interested in increasing my share of the business in my trade teritory. Yes, I would like to get more business and make more money. To get more business you have to take into consideration getting a better line, getting more national lines, putting on more salesmen, being able to sell more merchandise.

Q. Would an increased profit margin enable you to hire more salesmen and, for instance, enable you to be more aggressive in your territory?

A. Probably.

Certainly I am interested in buying merchandise at the cheapest net price available. I say that because the cheaper I can buy, the more competitive I become, and the more money I can make (Part 3, Page 900). We are furnished with a suggested re-sale price list by Moog. We follow that. As far as I know, my competitors who offer Moog products follow this suggested price list. To be injured competitively I imagine that if Clinton Square sold the merchandise below my price, that would be injuring me competitively. As long as they hold up the price the same as we do, I am not competitively injured (Part 3, Page 901).

ALFRED H. FEASTER testified as a witness on behalf of Respondent as follows:

My name is Alfred H. Feaster and I am connected with Wheels, Incorporated, who operate in Newark, New Jersey.

The witness was shown Commission's Exhibit Number 64, showing coil action sales and rebates to jobbers in Newark, New Jersey (Part 3, Page 902).

Q. I ask you whether or not, from the differentials that appear on this Government Exhibit 64, you know

whether Wheels, Inc., was competitively injured by reason of those differentials for the years 1947, 1948 and 1949.

Mr. Schrup: The same objection as heretofore.

Hearing Examiner Kolb: Overruled.

A. No, we were not competitively injured.

Q. Do you buy Coil Action Parts from any other company?

A. No.

Mr. Schrup: We have an objection on that, as immaterial.

Hearing Examiner Kolb: Overruled.

By Mr. Butterfield:

Q. Is there available to you in the market coil action parts from other companies?

A. Yes, sir.

Mr. Schrup: Objection. I object to that as being (Part 3, Page 904) entirely immaterial to this case. The charge is discrimination by Moog Industries, not of others, Mr. Butterfield.

Mr. Butterfield: The purpose of that, if your Honor please, is that there has been some question about not asking these questions on direct examination. I have been bringing this out on cross-examination, and it was in my mind that your Honor objected to asking these questions on re-direct after cross-examination by counsel. And I wanted to straighten it out by asking these questions on direct examination, because one of the charges in here is the tendency to create a monopoly in this particular line of commerce, and it is to meet this charge that I have asked these questions of this witness, as to whether or not there was available to this witness coil action parts from other sellers in the Newark area.

Hearing Examiner Kolb: The objection will be overruled. The witness may answer.

A. Yes.

By Mr. Butterfield:

Q. And at substantially the same prices that you were paying for the same parts—

Mr. Schrup: I object to that. In the first place, it is not proper examination of this witness. The best evidence of prices of competitors is to bring in the competitors.

Hearing Examiner Kolb: This witness should know whether or not this material is available at the same price, or approximately the same. The objection is overruled. The (Part 3, Page 905) witness may answer.

A. Quite honestly, that would be something we would have to investigate ourselves, if we found ourselves in that situation. But I will presume that the other manufacturers could be competitive, within the same price.

Mr. Schrup: I move that the witness' presumptions be stricken in the answer.

A. (Continuing) Well, then I would say they are.

Mr. Schrup: I move that any presumptions be stricken from the record.

Hearing Examiner Kolb: The witness first said it was based upon a presumption, and then said that they are competitive. Do you want to strike the presumption?

Mr. Schrup: If he stated of his own knowledge, it probably is satisfactory.

Hearing Examiner Kolb: What is your motion?

Mr. Schrup: When he said he presumed. I move that the presumptions be stricken out.

Hearing Examiner Kolb: That part of the answer?

Mr. Schrup: Yes.

Hearing Examiner Kolb: That part of the answer may be stricken.

By Mr. Butterfield:

Q. I ask you, Mr. Feaster, whether or not you know of your own knowledge whether Moog Industries are the largest sellers of these coil action parts, or comparatively small? (Part 3, Page 906.)

A. I frankly cannot answer the question.

Yes, of course, I would like to buy my merchandise at the best net price available. That would be true as to Moog Industries.

Q. I direct your attention to Commission's Exhibit 64, with particular reference to the year 1949, which shows

that your company, Wheels, Inc., was the largest purchaser of coil action parts from Moog Industries, Inc., in Newark, New Jersey. You received, or you paid 86 per cent of the net price to Moog for those parts. I also call your attention to two other customers, American Motor Specialties Company and Clinton Square Auto Parts Company.

Mr. Butterfield: I object to the characterization of those two as customers of Moog. That is one of the issues in this case.

Hearing Examiner Kolb: Overruled (Part 3, Page 907).

By Mr. Mayer:

Q. Those purchases show on the exhibit as, in round figures, $3,300 and $7,600, in comparison to your $9,300, both paying a net price of only 81 per cent of the net price for Moog parts, in 1949. I ask you, wouldn't you like to have paid 81 per cent of the net price for your parts, Mr. Feaster, from Moog?

A. Yes, of course, but—

Q. The question was, would you like to have paid?

A. Yes.

Q. Why do you say that, sir?

A. Why do I say yes?

Q. Yes, sir.

A. Because it would represent a better income for the company.

Q. And that income is important to you?

A. Yes.

Q. And helpful in the operation of your business?

A. Yes.

Q. Do you re-sell Moog parts at suggested re-sale prices?

A. Yes.

Q. Do your competitors re-sell at the same suggested prices?

A. So far as we know.

Q. A moment ago, in answer to a question of Mr. Butterfield, you said that you were not competitively injured.

What do you mean by competitively injured? (Part 3, Page 908.)

A. Well, something that would, let's say, reduce our sales, hurt us because we are strictly a sales organization.

Q. Would factors which tend to keep you from increasing your sales also amount to competitive injury to you?

A. I would say, yes.

Q. In your idea of competitive injury, would you say it would be more or less summed up in the idea of losing customers because of sales made at below the suggested re-sale price?

A. That would be competitive injury, yes (Part 3, Page 909).

Hearing Examiner Kolb: Mr. Butterfield, does that complete the witnesses for the present series of hearings?

Mr. Butterfield: Yes, for the present series of hearings.

Hearing Examiner Kolb: In New York?

Mr. Butterfield: Yes. But since I talked to Your Honor yesterday there is a question that comes up as to whether or not San Francisco and Los Angeles, on the Whitaker Cable Corporation case, would be the most advantageous for the Government and for the Whitaker Cable people (Page 910).

A colloquy ensued between the Hearing Examiner, Mr. Butterfield, Mr. Mayer, and Mr. Schrup. • • •

Hearing Examiner Kolb: Let the record show further that the hearing is set for Wednesday, February 18th, for three days, in Moog. I understand that there will be one additional hearing, possibly in Detroit, on the question of meeting competition, and another hearing on the cost justification, and that you are to have your cost justification ready by the latter part of April, and that you will then present that to the Commission's attorneys, and that they will then set the hearing on that, possibly at St. Louis for Moog, and for Whitaker Cable, at Kansas City.

Now, you are also to determine when that hearing on meeting competition is to be set, and let me know during the course of this hearing what date that will be, preferably prior to the cost justification defense being put in.

Hearing Examiner Kolb: On the record.

Let the record show that a hearing will be set for Des Moines, Iowa, Wednesday, February 18, 1953, for three days, and then either Los Angeles or San Francisco, beginning Tuesday, February 24, 1953, for four days. Let the record show further that the hearing is set for Wednesday, February 18th, for three days, in Moog. I understand that there will be one additional hearing, possibly in Detroit, on the question of meeting competition, and another hearing on the cost justification, and that you are to have your cost justification ready by the latter part of April, and that you will then present that to the Commission's attorneys, and that they will then set the hearing on that, possibly at St. Louis for Moog, and for Whitaker Cable, at Kansas City.

Now, you are also to determine when that hearing on meeting competition is to be set, and let me know during the course of this hearing what date that will be, preferably prior to the cost justification defense being put in (Part 3, Page 929).

* * * *

At Washington D. C.

This is a hearing in the matter of Whitaker Cable Corporation, Docket 5722, and Moog Industries, Inc., Docket 5723.

Hearing is being held in these cases pursuant to order of the Hearing Examiner to show cause why testimony should be taken at Wichita, Kansas, issued March 12, 1953. By agreement of counsel, these hearings will be held together and separate record made in each case.

Mr. Butterfield: If the Examiner please, in the Moog Industries case, 5723, and in the Whitaker Cable Corporation case, Docket 5722, a request was made by respondent for hearings in Wichita, Kansas, for the purpose of rebutting certain evidence that has heretofore been introduced into evidence on behalf of the Government on its case in chief.

In the Moog case, on the 8th of October, 1951, and and on March the 4th, 1952, there were introduced into evidence and received over the objection of counsel for

the respondent, Exhibits Nos. 61 to 79-G, 28 pages, 623 items purporting to show illegal price differences in the sale of commodities by the respondent to the purported purchasers named in those exhibits, in 236 communities in 23 States.

At the close of the case hearings were set in St. Louis (Part 3, Page 931), Denver, Dallas, New Orleans, Memphis and New York. Hearings had been requested for Birmingham and Des Moines, which hearings have not yet been set.

Trial Examiner Kolb: Mr. Butterfield, in reading your answer it appears in reading it that you are charging that I have refused to permit you to hold a hearing in Birmingham, Alabama. That is not true.

Mr. Butterfield: No, I didn't charge that.

The respondent's attorney had hoped by the means of these test hearings to persuade counsel for the Government to in some manner restrict their testimony in regard to these Exhibits 61 to 79-G and to try and persuade the Government to withdraw a part of those documents, it being the opinion of respondent's attorney that the evidence included in those exhibits was quite cumulative and that it placed an insurmountable task on the respondent in meeting the evidence.

In the Whitaker case, in 5722, request was made for hearings in Los Angeles and San Francisco, but respondent has been advised, and understands, that the Government attorneys have agreed not to take into consideration those exhibits covering that testimony, and at the proper time motions will be presented to strike from the record exhibits referring to the West Coast area.

Now, Wichita is the central location and sets in the heart of several communities in Kansas, among which are (Part 3, Page 932) Winfield, Wellington, El Dorado, McPherson, and Hutchinson.

There are quite a few communities revolving around that particular trade area and there are numerous jobbers whose names appear on these Government exhibits purporting to have made purchases from both the Moog Company and the Whitaker Company in that particular area.

The respondent finds that it is in this position: It must either rebut that evidence that the Government has put in or the Government will have to withdraw such evidence as respondent is not permitted to rebut, because to leave the evidence that the Government has already introduced in the record, without permitting respondent to rebut it and show what the facts are in regard to the issues of competitive injury of monopoly would be a denial of due process and would not result in a fair trial being afforded to the respondent.

Now the respondent has offered in the balance of the exhibits in both cases to stipulate that if the witnesses called in the remaining areas, these jobber witnesses, if these witnesses were called, that each of them, if taking the stand, would testify that he knew the facts surrounding his own business and that from such knowledge he would testify that in his opinion he had not been competitively injured and that they would testify on cross-examination substantially the same as they have testified in these other hearings that we have had (Part 3, Page 933).

Trial Examiner Kolb: Isn't that the same stipulation that you refused to enter into in New York?

Mr. Butterfield: No, the stipulation that the counsel in New York wanted me to enter into was that all the witnesses called would testify substantially the same on both direct and cross-examination as the other witnesses had testified.

Trial Examiner Kolb: Their testimony on direct examination was—

Mr. Butterfield: On direct examination they would testify substantially the same as these other witnesses had testified.

Now there is only one thing in common in that testimony and that is the question of competitive injury; all the other factors are different.

Now the other testimony that is in there in regard to the amount of purchases and the conditions of the area and what they deal in and what they do is all different, but the one thing that is common to those witnesses in the major is that they were not competitively injured. Now

that is a statement, a sworn statement of fact, given by these witnesses.

Now it would not be sufficient for the respondent to meet the case by merely stipulating that they would all testify substantially the same on direct and cross-examination because that would only confuse the record, and would resolve (Part 3, Page 934) into another argument.

There is one thing that cannot be argued, and that is a fact. Opinions can be, but not facts; and it was for the purpose of getting the facts in this record that respondent has asked for these hearings.

The respondent has put on various of these jobber witnesses as to dollar amounts shown, and particularly in regard to amounts received as rebates, and in many instances it has been shown that the amounts purported to have been received have not been received at all, but only a small fraction thereof has been received by these particular jobber witnesses.

Now the doubt that has been cast upon these exhibits when related to the facts as they appear in the field is sufficient, in my opinion, to cast doubt on all of the exhibits that are now in the record, and I think that a motion would well lie at this time to strike from the record all of those exhibits.

However respondent is still willing to stipulate in regard to those exhibits in order to save space both for the Government and for the respondent, that if these witnesses are called, that they will testify that they have knowledge of the facts in regard to their business, and that from such knowledge they are of the opinion and know that they were not competitively injured by virtue of the pricing practices of (Part 935) the respective respondents.

I have tried innumerable times throughout this hearing, both in the case in chief and in respondent's case, to see if some reasonable narrowing down of this matter could be arrived at so that we would get for decision a clear-cut issue.

It seems very foolish for both the Government and the respondent to deal with 50 or 100 thousand invoices and sales when 50 or 100 might do it, because it is a tremendously expensive thing, and certainly it does place an in-

surmountable burden on the respondent to attempt to meet evidence of this kind, unless there is some reasonable restriction, and therefore I have in both cases moved in my answer to strike the exhibits in the Whitaker case, 37-A to 53-B, and in the Moog case, Exhibits Nos. 61 to 79-G, and if that motion is denied, I have moved, the respondents move, that the Government be required to make an election as to on what facts and what area it tends to rely in support of the complaint, and upon failure to make a reasonable election in regard thereto that the complaint be dismissed, and if both such motions are denied, that the Hearing Examiner set such hearings at such reasonable times as will afford the respondent an opportunity to meet the complaint and rebut the evidence received herein on behalf of the Government over the respondent's objection.

Trial Examiner Kolb: Well, Mr. Butterfield, we (Part 3, Page 936) held hearings at Denver, Dallas and New Orleans, at which time you put on witnesses and showed them the different prices as appearing on the charts and asked them whether or not they had been competitively injured by reason of the difference in prices, to which they testified they had not been injured.

Then, on cross-examination these witnesses were asked if the fact that they had not been competitively injured was due to the fact that they were all selling at the same price, and to a great extent the witnesses so testified.

Now we spent quite a lot of time in Dallas, Denver and New Orleans on just that testimony, and nothing else. At New Orleans I suggested or stated I didn't see any occasion for spending any time at Memphis or Birmingham to ask witnesses whether or not they had been injured competitively because of differing prices which Whitaker and Moog may have allowed to their competitors. It seemed to me we were getting into a lot of testimony and wasting time.

At that time I suggested, would you be willing to stipulate that if these witnesses were called at Birmingham and Memphis their testimony in chief and cross-examination would be substantially the same as that of the witnesses who were called in New Orleans, Dallas and Den-

ver, and we had a discussion off the record and you wanted to take additional testimony, particularly in the New York area, stating that (Part 3, Page 937) that testimony would be different.

I then set a hearing for New York and we met the same situation that we had in the other cities, the same testimony that they were not competitively injured, and that they were all selling at the same price.

At that time counsel in support of the same complaint offered to stipulate at Page 923 of the Whitaker record, and I believe the same thing appears in the Moog record, Mr. Schrup stated:

> "Mr. Butterfield, we will stipulate to this effect. We will stipulate with you that if you called other jobbers to the witness stand, that on direct examination and cross-examination they would testify as they have been testifying in the past hearings."

You objected to that stipulation and would not enter into that stipulation. You stated that you were particularly interested in taking some testimony on the West Coast. I then set the hearing tentatively for the West Coast, for Los Angeles and San Francisco.

Subsequent to that time counsel for the Commission stated that we would consider as not applicable any portion of the exhibits which applied to the California jobbers, and I understand that that has been agreeable and that that is the way the record stands at the present time (Part 3, Page 938).

Now it looks to me now that we are just quibbling over words. You state in your answer that you are willing to stipulate that these witnesses know that the situation is and that they have not been competitively injured, and their cross-examination would be substantially the same as those of the other witnesses. There is nothing in here so far as I see as to why we should have a hearing at Wichita, Birmingham, or any other place in the country to take jobber testimony.

Mr. Butterfield: The reason that is stated in there, if the Examiner please, is that the Government exhibits that

are now in the record, refer by name, date and amount and also some extensions in regard to those exhibits in those communities. Now those exhibits are in the record.

Trial Examiner Kolb: But you go into these communities and get the same testimony. A man says he has not been competitively injured. On cross-examination he testifies the reason he hasn't is because there has been no change in price.

There is no difference in price at which the jobbers are selling. Now it seems to me foolish to go from one end of this country to the other to put a witness on the stand, spend about a half an hour at a hearing, and then spending some time going to other towns to take the same testimony for about a half an hour, or two hours at the most. That is what I am trying to avoid (Part 3, Page 939).

If we can stipulate that the testimony would be the same, or whatever wording you want to get into, it seems to me it is a quibbling on words between you and counsel for the Commission.

Mr. Butterfield: I think that we could.

Trial Examiner Kolb: That would dispose of the whole thing.

Mr. Butterfield: I think we could arrive at a stipulation. I think that we could arrive at a reasonable stipulation, and I will take this opportunity, being down here, to see if I can't work out a reasonable stipulation with the attorneys for the Government, because I am not too happy in going to this tremendous attempt and expense on the part of the respondents to try to meet these exhibits.

Trial Examiner Kolb: Well, now the additional places which you would want to go would be Birmingham, Wichita, Des Moines, and where else?

Mr. Butterfield: I will have to work out a schedule on that and send it to you, if your Honor please. I was not prepared this morning for those.

Trial Examiner Kolb: You can tell pretty quickly. How long have you been at this defense, a year? You can tell as to where you are going to go today, can't you, to get jobber testimony?

Mr. Butterfield: I will know by the time those hearings are over (Part 3, Page 940).

Trial Examiner Kolb: You have got to know that today.

Mr. Butterfield: I will try to get it to your Honor some time today.

Trial Examiner Kolb: When did you pose the case?

Mr. Butterfield: March 4th, 1952, I believe is the date.

Mr. Mayer: Yes, March the 2nd.

Trial Examiner Kolb: This is March the 20th, 1953. You don't know yet where you are going to put on your witnesses?

Mr. Butterfield: I will give your Honor a schedule of that some time today.

Trial Examiner Kolb: Those will be all jobber witnesses, I understand.

Mr. Butterfield: The witnesses shown in the exhibits in regard to those particular communities.

Trial Examiner Kolb: I believe it is the same in both answers. Counsel has stated:

> "Respondent has offered to stipulate that if the rest of the witnesses named in said exhibits were called, each would testify on direct examination that he knew whether or not competitive injury was suffered by his company by virtue of pricing practices (Part 3, Page 941) of Whitaker Cable Corporation and Moog in the other case and based upon such knowledge would testify that his company and himself were not competitively injured and that upon cross-examination he would testify substantially the same as the witnesses already called".

Now, what objection, if any, do you have to that stipulation? First, Mr. Butterfield, if that stipulation is entered into that will avoid the calling of any further jobber witnesses in this case, is that right?

Mr. Butterfield: That's right.

Mr. Mayer: Well, if your honor please, as we originally offered the stipulation as to generally what the witnesses would testify if they were called, we have I think come to the point of quibbling, perhaps, but it seems to me that

in the stipulation as he offers it here—and I just got a look at it this morning when it was filed—he wants to specify what they will testify to on direct, but make it substantially the same when it comes to cross-examination. I think in fairness we are perfectly willing to stipulate that the testimony of the witnesses would be substantially the same on both direct and cross-examination, which is the stipulation we originally offered in New York.

Mr. Butterfield: I think maybe we can iron it out, Judge. I think I can convince counsel that the stipulation which I have offered here is a fair and reasonable stipulation and is done to short-cut the case and save expense and time (Part 3, Page 942).

Trial Examiner Kolb: Let's take a recess of 15 minutes and see what you can work out.

(Short Recess.)

Trial Examiner Kolb: As the result of the discussion between counsel off the record during the recess, the following stipulation has been agreed upon:

"That future jobber witnesses if called in the various other areas listed in the Commission's charts would testify on direct examination that they had not suffered any competitive injury because of differing prices of the respondent, and on cross-examination their testimony would be the same as that of the witnesses previously called at Denver, Dallas, New Orleans, Memphis and New York".

Is that satisfactory, Mr. Butterfield?

Mr. Butterfield: Will you read it back, Mr. Reporter?

(The Reporter read the stipulation.)

Mr. Butterfield: That stipulation is all right.

Mr. Mayer: May we go off the record a moment?

(Discussion off the record.)

Trial Examiner Kolb: On the record.

Mr. Butterfield, is the stipulation as read into the record by the Hearing Examiner satisfactory? (Part 3; Page 943.)

Mr. Butterfield: It is.

Trial Examiner Kolb: Is it satisfactory, Mr. Mayer?

Mr. Mayer: It is.

Trial Examiner Kolb: I also understand that by reason of this stipulation there will be no necessity of striking any of the portion of the charts dealing with the West Coast area. Is that correct, Mr. Butterfield?

Mr. Butterfield: That is correct.

Trial Examiner Kolb: Is that correct, Mr. Mayer?

Mr. Mayer: Fine.

Trial Examiner Kolb: Off the record.

(Discussion off the record.)

Trial Examiner Kolb: All right, on the record.

Insofar as the answer of the respondent to the rule to show cause why hearings should not be held at Wichita, Kansas, renews a motion to strike the exhibits, this motion will be denied.

Mr. Butterfield: Exception.

Trial Examiner Kolb: Now, Mr. Butterfield, as I understand it, the stipulation will terminate the necessity of calling any further jobber witnesses in this proceeding on the question of injury.

Mr. Butterfield: Yes (Part 3, Page 944).

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Trial Examiner Kolb: The hearing will come to order.

Mr. Butterfield: If Your Honor please, the motion which I have just presented is a motion that the Hearing Examiner issue a rule for the attorneys in support of the complaint to make elections in the following respects (Part 3, Page 954):

First, of the many hundreds of commodities which are being sold by the respondents, which of those do the attorneys in support of the complaint maintain are or have been sold by the respondent in violation of Section 2(a) of the Clayton Act, Robinson-Patman Amendment, Title 15, Section 13, U. S. Code?

Which effect is it that the attorneys in support of the complaint maintain the respondent has been or is adversely

knowingly violating interstate commerce directly or indirectly, in which of the 235 communities in the 23 States shown on the tabulations offered over objection and received in evidence, showing dollar sales to purchasers in those communities? In which of those do the attorneys in support of the complaint maintain that the sales have been or are being made in violation of the Robinson-Patman Amendment?

Which of the following effects do the attorneys in support of the complaint maintain that sales made by the respondent have or are have been charged to be in violation of Title 15, Section 13, U. S. C.:

(a) Substantially to lessen competition?

(b) Is the charge tendency to create a monopoly?

(c) Is the charge an injury to competition?

(d) Is the charge destruction of competition?

(e) Is the charge a prevention of competition on the part of the respondent? (Part 3, Page 955.)

Which of the following persons do the attorneys in support of the complaint maintain that any one of the effects set forth in paragraph 4 above result in competitive injury, destruction, prevention or lessening of competition, or monopolizing or tendencies to monopolize in respect to commodities which have been or are being sold by the respondent:

(a) Is it competitive?

(b) Is it a customer knowingly receiving?

(c) Is it a customer of a competitor?

(d) Is it a customer of the respondent?

(e) Is it a knowing customer of respondent's customer?

(f) Is it a customer's customer of any of those?

In which of the many months shown on the exhibits offered by the attorneys in support of the complaint—and these exhibits cover periods from 1946 to 1950, inclusive—which of these months, or any of the months in that period

of time, shown on the exhibits, offered by the attorneys in support of the complaint and accepted in evidence over the objection of the respondent, do they maintain that the violations charged in the complaint occurred?

The respondent further moves that the attorneys in support of the complaint be required to answer this rule (Part 3, Page 956) upon the short date to be set for a hearing, upon the rule and answer, and that upon default of the answer thereto that the complaint against the respondent be dismissed forthwith.

As grounds for these motions, respondent respectfully submits that by virtue of the undue plurivation of the evidence by the attorneys in support of the complaint who have offered—and there have been received over the objection of respondent in evidence voluminous tabulations of dollar amounts and percentage extension of differences as small as 1/100 of 1 percent, without regard to the hundreds of commodities included in the single figure and involving many thousands of invoices in hundreds of communities in almost half of the United States, covering sales over many months and years.

There has been placed upon the respondent an almost insurmountable burden of analysis and proof, requiring the breakdown of thousands of invoices and cost allocations, requiring the addition of thousands of man-hours of time, extensive, exhorbitant and needless work, and causing such delay in the proper and judicious disposition of this matter on its merits, to the extent that a fair and impartial hearing is denied to the respondent, so as to amount to the denial of this respondent a fair and impartial hearing provided by Congress under the Administrative Procedure Act, Title 5, Sections 1004, 1006 and 1-11, and as guaranteed (Part 3, Page 957) by the Fifth Amendment of the Constitution of the United States of America, and so as to deny a hearing consistent with the fundamental principles which inhere in due process of law, and in denial and disparagement of those fundamental rights not enumerated in the Constitution but retained by the people, and guaranteed by the Ninth Amendment to the Constitution.

Now, the purpose of that motion, if Your Honor please,

is this: The Federal Trade Commission compiled from books and records of Moog Industries, Inc. figures and tabulations covering 75 percent of all of the invoices in the Moog place. Now, the bulk of those invoices were never examined by the accountants or the investigators for the F.T.C., and yet those invoices are represented in those tabular figures.

In order for the respondent to have a fair opportunity to defend itself against the charge in this case, the respondent cannot tell which of these transactions the attorneys in support of the complaint relied upon, and to require the respondent at this late date to have to go through, to avail itself of the defenses under the Act, each one of these invoices and break it down and analyze the commodity that was sold, and to show the effect of the sale of that commodity on the invoices to the particular person or persons shown, to show the effect of the sale, the cost of manufacture (Part 3, Page 958) sale or delivery is a task that will take many years and many, many thousands of dollars to accomplish, and it does not seem reasonable that several hundreds of thousands of invoices should be used by the attorneys in support of the complaint to make a position which could just as easily be made with a few invoices selected from the respondent's files.

It should not be necessary to go all over the United States and go into these out-of-the-way communities, to get witnesses to defend against the charges made in this complaint, and the respondent also is entitled to be advised as to what the nature of this complaint is, what it is that the attorneys in support of the complaint are driving at.

The respondent had no notice of any violation or any charge of any violation under the Robinson-Patman Amendment to Section 2 of the Clayton Act until the issuance of the complaint itself. It is true that for many years there were investigators in there, but those investigators came in under the guise of the car manufacturers' competitive effect on the small independent manufacturer, and the respondent cooperated with the investigators in every respect. They were in there from 1938 on, and it was consternation on the part of the respondent without

ever having been called down for a conference, without ever having been advised or even suspected of being charged with violation of the Robinson-Patman Act (Part 3, Page 959). The complaint has been issued and from the record made in this case it still cannot be determined in this maze of evidence what it is that the attorneys in support of the complaint are relying on to maintain the charges of violation of Section 2(a).

It is for that reason that if this issue can be reasonably narrowed down so that the respondent can be given an opportunity to present to the Federal Trade Commission an understandable and not exorbitantly expensive series of documents and evidence which they will have to get together to meet this case. It seems that the interests of fair play and justice require that the issues be stated simply and bluntly as to what it is that these respondents are doing that is charged to be in violation of the Act, and at least give them an opportunity to defend against it, because the refusal to narrow the issue down actually presents the respondents with an interminable lawsuit, and an expense which the—well, the respondent will not be in the automobile business, but will be in the business of defending itself against the Robinson-Patman violation, and the company is too small for that kind of a thing. A large company could possibly do it, such as Standard Oil or General Motors, and some of those. They could hire a group of experts. But, this is done all within the company itself. This company has only 250 employees (Part 3, Page 960).

Now, in the automobile industry 250 employees is a very, very small number, and they have neither the resources at their command, nor have they the personnel to meet a terrific case like this, unless they just go into the business of defending themselves against this charge, because Moog Industries cannot expect to defend against all the complex, economic and business theories that might be developed, that are applicable to a business leviathan, and be expected to carry that burden.

If there is something that is being done wrong, it seems to me the attorneys in support of the complaint should be

required to elect which thing it is, or which of 2 things it is, or maybe 3 things, but not 100 or 200 thousand things.

It is for that reason that this motion is made, because if we can't do that, then we are going to have to have an awful lot more time to prepare for our defense in this case.

Trial Examiner Kolb: Mr. Mayer?

Mr. Mayer: I think our record in this proceeding fairly well speaks for itself, and I think that the counsel for respondent well knows the issues which have been raised by this complaint, and which have been raised by the introduction that we have offered in support of the separate allegations under the complaint in this matter (Part 3, Page 961).

We have closed our case on March 2nd, I believe it was, in 1952, and it seems to me that the respondent has had ample time to elect whatever defense it intends to use to properly present that evidence for analysis in determining whether or not the issues of the complaint have been supported or whether they have been properly defended.

I think we have been more than fair in presenting the pricing pattern and scheme of Moog Industries, Inc., in a rather concise fashion in this complaint, and I don't feel that the counsel for respondent needs any further clarification in the first instance, of what the issues are that have been raised under this complaint, and certainly I do not feel at this date he is even entitled to it.

Trial Examiner Kolb: Is there anything further?

Mr. Butterfield: That is all, Your Honor.

Trial Examiner Kolb: Motion denied (Part 3, Page 962).

HUBERT C. MOOG testified on behalf of the Respondent as follows:

Direct Examination (Part 3, Page 962).

My name is Hubert C. Moog, residing in St. Louis Missouri, and I am Executive Vice-President of Moog Industries, Incorporated. I have been Executive Vice-

President since the death of Mr. Apple on approximately January 10, 1952. I began to assume Mr. Apple's responsibilities as time went on and I believe I can state, without fear of contradiction, that I do have full responsibility. I began working for the company on a full-time basis after graduation from college in 1935. My profession is really a metallurgical engineer (Part 3, Page 963).

Consistent with the many jobs I have held with the company, I believe I am familiar with the selling prices of Moog Industries. I have held jobs both in the manufacturing end and the sales end, and now, as Executive Vice-President, my responsibilities relate to the functions of manufacture, sales, and delivery.

At the present time Moog Industries has a practice of granting cash discounts for the prompt payment of bills on or before the 10th proximo. It is a cash discount of 2%. I am not familiar with what has been been shown as that in this record (Part 3, Page 694). Our competitors also offer a cash discount of 2% for prompt payment of bills. A cash discount of 2% is a standard practice in our industry, and that practice has been in effect generally since 1936 (Part 3, Page 965). We find it necessary to engage in the practice of granting this 2% cash discount for the prompt payment to us, in order to prevent our customers from buying products competitive to our products from our competitors. Our company has a practice of absorbing shipping charges on shipments of a certain size.

Q. Do your competitors also absorb shipping charges on shipments of a certain size?

A. I object to that question, unless he shows the materiality of it, or the relevancy of it.

Trial Examiner Kolb: In what way is that material?

Mr. Butterfield: The attorneys in support of the complaint have introduced in evidence in this case the matter of absorption of shipping charges by Moog Industries, Inc., and by the introduction of that evidence they have made relevant the question of the effect of the absorption of shipping charges on violations of the Robinson-Patman Act.

Trial Examiner Kolb: I don't see any materiality as to whether or not his competitors follow that practice. I will sustain the objection.

By Mr. Butterfield:

Q. Do you find it necessary at this time, Mr. Moog, to (Part 3, Page 966) engage in the competitive marketing practice of absorbing shipping charges on shipments of a certain size, as shown in the record in this case, in order to prevent your customers from buying products competitive to yours from your competitors?

Mr. Mayer: I object to that question, unless he proves the proper foundation for it.

Trial Examiner Kolb: The objection will be sustained unless proper foundation is made.

Mr. Butterfield: I have offered to Your Honor a man of two decades of experience with this company, a man who is Vice-President in charge of manufacture, sale and delivery of Moog products, a man who has been engaged in this business ever since he graduated from college as a professional metallurgical engineer, a man who since the death of Mr. A. A. Apple, one of the witnesses in this case is the only single qualified individual having complete knowledge to testify in connection with one of the most vital competitive practices in the automotive industry.

I believe, and submit, that this witness is fully qualified from his experience, his position, his responsibilities in this matter to answer a question as to whether or not he has to absorb shipping charges in order to prevent his customers from buying the products of his competitors (Part 3, Page 967).

Trial Examiner Kolb: Objection is still sustained.

Mr. Butterfield: At this time, if Your Honor please I wish to make an offer of proof, that the Executive Vice-President in charge of sales of Moog Industries, Inc., having had experience for 19 years with the single company, Moog Industries, Inc., having knowledge of the facts, and being actually charged with the responsibilities involved in the marketing problem of Moog Industries, Inc., would testify, if allowed to so testify, that it is necessary for Moog Industries, Inc., to absorb shipping charges on ship-

ments of a certain size, as shown in the record heretofore made in this case by the attorneys in support of the complaint, in order to prevent the customers of Moog Industries from buying their competitive products, products competitive to the products manufactured, sold and delivered by Moog Industries from competitors of Moog Industries.

The witness will also testify, upon examination, that it is necessary to do this in order to prevent Moog Industries, Inc., from losing its customers. The witness will also testify that if those shipping charges are not absorbed that the customers of Moog would go to the competitors. He would also testify that it is an industry-wide practice to absorb shipping charges on products competitive with the products manufactured and sold and (Part 3, Page 968) delivered by Moog Industries on shipments of the size shown in the record made in this case.

That is my offer of proof, Your Honor.

Trial Examiner Kolb: The offer of proof is refused.

By Mr. Butterfield:

Q. Mr. Moog, do you know that it is unlawful to discriminate in price between different purchasers of commodities of like grade and quality, in interstate commerce, where the effect of such discrimination may be substantially to lessen competition, or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with the customers of either of them, except where the differentials make only due allowance for differences from the cost of manufacture, sale or delivery, resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered, and except where the Federal Trade Commission, after investigation and hearing to all interested parties, fixes quantity limits, and when so fixed, differentials exceeding the quantities shall not be permitted, except that you may select your own customers, not in restraint of trade and except where price changes are made from time to time in response to changing marketing (Part 3, Page 969) conditions, and except where your lower price was

made in good faith to meet the equally low price of your competitors, or the services or facilities furnished by such competitors.

A. Mr. Butterfield, would you mind asking the question again?

Trial Examiner Kolb: Let the reporter read the question.

(The question was read by the reporter.)

By Mr. Butterfield:

Q. Do you understand that question, Mr. Moog?

A. Yes, as well as possibly anyone else, sir, can read, I do.

Q. What is your understanding of that law?

Trial Examiner Kolb: Is this man a qualified attorney?

Mr. Butterfield: This is the man that has to operate under the law. He is the man that has to make the contacts and the judgments every day.

Trial Examiner: Is it your position that he does not understand the law, or that he does understand it, or is operating without knowledge, or something of that sort? I can't see the purpose of this line of examination. I don't think it is material at all.

Mr. Butterfield: This is the law in which he is operating, if Your Honor please, and what he understands the (Part 3, Page 970) law to be in his operations determines how he conducts himself.

Trial Examiner Kolb: There being no objection, the witness may answer.

The Witness: It is difficult to understand exactly what the Congress had in mind in this law. That is the way I feel about it. However, I want to state that it is, with all of the qualifications and the variations in such an operation, it is tough under the law.

Now, we do not mean any injury to any competition. We certainly are not trying to put anyone out of business. That, I certainly feel I should state at this time. We do, however, have to face competition. We know that we have to keep competitive at all times.

By Mr. Butterfield:

Q. Are you at the present time injuring anybody?

Mr. Mayer: Mr. Examiner, I object to that question.

Trial Examiner Kolb: The objection is sustained.

By Mr. Butterfield:

Q. Mr. Moog, do you find it necessary to maintain your present pricing practices in order to exercise your statutorily recognized right to select your own customers in bona fide transactions, and not in restraint of trade?

Mr. Mayer: Mr. Examiner, could I have that question read? (Part 3, Page 971.)

Trial Examiner Kolb: Read the question.

(The reporter reads the question as follows:

"Question: Mr. Moog, do you find it necessary to maintain your present pricing practices in order to exercise your statutorily recognized right to select your own customers in bona fide transactions, and not in restraint of trade?")

Mr. Mayer: I don't see the relevance of that question to this proceeding.

Trial Examiner Kolb: I can't see how pricing practices have to do with the selection of customers, unless you mean he gives different prices to different customers on the basis of selecting them. Is that what you mean by that question?

Mr. Butterfield: Do you understand my question, Mr. Witness?

The Witness: I believe I do.

Mr. Butterfield: The witness says that he understands my question. I will try to explain it to Your Honor, if I may.

Mr. Mayer: Perhaps it would be better if Mr. Butterfield would explain the purport of the question.

Trial Examiner Kolb: That is what I would like to know, the purport of the question.

Mr. Butterfield: The purport of the question is (Part 3, Page 972) the Robinson-Patman Act allows—well, I will have to get the Act. I can read the exact language of the Act.

Examiner Kolb: They start out that a man has the right to select his own customers.

Mr. Butterfield: Yes, the man has the right to select his own customers.

* * *

Mr. Mayer: I still fail to see where a proper foundation is laid for that question in tying the pricing (Part 3, Page 973) practices to the selection of customers.

Examiner Kolb: I will sustain the objection (Part 3, Page 974).

At the present time we select our own customers in bona fide transactions that are not in restraint of trade (Part 3, Page 974).

A. We select our customers in bona fide transactions at the present time.

Q. Are those transactions in restraint of trade?

Mr. Mayer: That is a conclusion again from this witness. A description of the methods by which Moog selects its customers would then afford the Examiner, or anyone else, an opportunity to determine whether or not it is in restraint of trade.

Trial Examiner Kolb: Objection will be sustained (Part 3, Page 975).

I believe I understand what restraint of trade is. In my twenty years in business with this company I have never known it to engage in a practice which I believed to be in restraint of trade. As to what we find it necessary to do to select our customers, I would say the most necessary thing is to offer them a product of quality, to give them good service, and to price it competitively. We have to give our customers a product which is at least equal in quality to our competitors; we have to provide them with a service which is no worse than our competitors. We have to price it competitively with our competitors' pricing structure (Part 3, Page 976). Our competitors' pricing structures are similar to our own. Our pricing structure is similar to the pricing structures used by our competitors in the industry. I believe it is necessary for us to exercise our present pricing practices to meet our competitors' pricing structures and their method of doing business.

Trial Examiner Kolb: What do you mean by pricing practices, Mr. Moog? Is that your price list that you send out?

The Witness: Pricing, Judge, is a combination of many things. It ends up with the final result, at least in my mind, if I may state what I feel—it ends up with the final result of so many dollars. However, it is arrived at in a good many different ways and includes a good many different things.

Trial Examiner Kolb: But it all comes out with the price list which you issue on which you sell your commodities; is that correct? (Part 3, Page 977.)

The Witness: Not necessarily. Shall I expound on that?

Trial Examiner Kolb: Do you have prices other than your published price sheets?

The Witness: No, but we have other things that affect prices.

Trial Examiner Kolb: You mean such as freight, and so forth?

The Witness: That is right. It all comes down to dollars and cents.

Trial Examiner Kolb: You may proceed.

By Mr. Butterfield:

Q. Will you explain, Mr. Moog, how your pricing practices are related to your costs of manufacture, sale and delivery?

* * *

The Witness: I believe that our pricing practices are arrived at really more from a competitive standpoint and include also—from the competitive standpoint, that is included in your price of selling. We also have costs of manufacturing which must be added and costs of delivery which have to be added to that same thing in order to arrive at a functional price. I hope that I am being clear (Part 3, Page 978).

By Mr. Butterfield:

Q. There are differentials, of course, in your costs of sale, and are those reflected in your pricing schedules?

A. Yes, sir, I believe they are.

Mr. Mayer: May I ask you if those are the published pricing lists in the schedules—the regularly published price list with the schedules of the Moog Industries that we are talking about, in your last question?

Mr. Butterfield: Let me explain it this way: There is no requirement in any industry that I know of to publish prices.

Mr. Mayer: Let's just talk about Moog now. What about the last question? Was that only related to the published list of prices of Moog Industries?

Mr. Butterfield: What do you mean by "published"? There are no published tariffs like there are in a public utility.

Trial Examiner Kolb: Does Moog issue price lists?

Mr. Butterfield: Yes, sir.

Trial Examiner Kolb: It sells its merchandise on the basis of those price lists?

Mr. Butterfield: That is correct.

Trial Examiner Kolb: What do you mean, that you (Part 3, Page 979) don't understand what we are talking about?

Mr. Mayer: All right. * * *

Moog issues catalogs showing and describing the hundreds of commodities that we either manufacture or offer for sale. In connection with those catalogs we also issue price lists, a.d in connection with those price lists we also issue and publish discount schedules. I believe our differentials in cost of sales are reflected in the differentials in the pricing schedules. I believe that differentials in our cost of manufacture are also reflected in the differentials in the discount schedules which are published in connection with the price lists and the catalogs (Part 3, Page 980), and the differentials in our cost of delivery are also reflected in our discount schedules which are published in connection with the catalogs (Part 3, Page 981). I believe that we do have cost differentials in our costs of sales. These cost differentials are reflected in our published price schedules and our published discount schedules, as shown in connection with our catalog descriptions. To

the best of my knowledge, we have no prices which are not published to the trade generally (Part 3, Page 982). Our pricing practices are all reflected in our published distributors' agreements, including the discount schedule, the terms of sale as to freight absorption and as to cash discounts, in the published distributors' net price list, and the catalogs. All of the above embody our pricing practices. The pricing practices of our competitors are very similar to the pricing practices that we use (Part 3, Page 983).

Q. Do you believe the pricing practices of your competitors to be lawful?

Mr. Mayer: Mr. Examiner, I object to this question again on the basis of the foundation until we have the pricing practices of the competitors set for it specifically in this record.

Trial Examiner Kolb: The objection will be sustained.

Mr. Butterfield: Do you really want me to bring in as witnesses all of these competitors in this case?

Mr. Mayer: Mr. Butterfield has not yet announced what defense he is purporting to raise at this particular hearing, and I think we are at least entitled to find out what it is.

Mr. Butterfield: The statute announces the defense, does it not? It is embodied in the defense. You have never announced what the prosecution is except as announced in the statute.

Mr. Mayer: The statute gives the respondent several defenses.

Mr. Butterfield: And the statute gives the attorneys in support of the complaint several prosecutions, and I cannot seem to get an election out of you which of the prosecutions you are proceeding on, nor an expression from you (Part 3, Page 984) that we are guilty of all of the things charged in the Robinson-Patman Act as being unlawful. You make it very difficult for us to defend against a case in which we cannot find out what the charge is or what you are relying on.

Trial Examiner Kolb: Off the record.

(Discussion off the record.)

Trial Examiner Kolb: The objection will be sustained (Part 3, Page 985).

In the replacement field, to my knowledge, we have no prices that are not published. We have no prices to which all of our present customers do not have access. For the time that I have been actually in management of the company, all of our prices in the replacement field have been published and on paper for everyone to see. We have no prices in effect at the present time that are not available to all of our customers on proportional equal terms (Part 3, Page 986).

I have been in this business since 1935 and we are engaged principally in the automotive replacement field. As to original equipment, I would estimate that part of our business to be less than 1% of our total business, and that part of our business is principally in leaf springs on an emergency basis and not on a regular basis.

Q. Before World War II, about what was the dollar volume in consumer prices of the replacement field in which you were engaged?

A. I have seen figures published on the dollar volume at consumer prices, and it was estimated before World War II this figure was in the neighborhood of $500 million, or half a billion (Part 3, Page 987).

As to our pricing practices prior to World War II, and our reliance on those figures, they are called "Marketing Research Figures," which we used for quotas in determining what to aim at for our sales analysis work. We have to have something to pin our hat on and we do pay attention to those figures for that reason, and we use those figures in our marketing practices.

Q. And about how was that half a billion dollars split up between the replacement independent manufacturers, the car manufacturers, and chain stores? * * *

Hearing Examiner Kolb: The witness may answer.

The Witness: The figures which we have seen, which we have on file in St. Louis, indicate the pre-war replacement parts manufacturers were merchandising 60 per cent of this (Part 3, Page 988) volume; the car manufacturer merchandised 30 per cent of this volume; and the chain stores merchandised approximately 10 per cent.

By Mr. Butterfield:

Q. At the present time, Mr. Moog, what is the approximate size of this replacement market?

Mr. Mayer: I have the same objection, if the Examiner please.

Hearing Examiner Kolb: Overruled.

The Witness: Based on 1952 figures, and substantiated by such organizations as are able to supply us with information of this type, we find that the car manufacturer now merchandises 60 per cent of the total volume; the independent manufacturers now merchandise 30 per cent of this new volume, and the chain stores merchandise approximately the same 10 per cent they had pre-war.

The size of that market at the present time is now a 2½ billion dollar market. That is about five times what it was in pre-war times. Our sales during pre-war times were in the neighborhood of one-half of our present volume (Part 3, Page 989).

Q. Mr. Moog, calling your attention to springs at consumer prices, about what is the dollar value of the production that you manufacture that goes into the average automotive car?

Mr. Mayer: I object to that, Mr. Examiner, I don't see any relevance to this questioning.

Hearing Examiner Kolb: What is the purpose of that, Mr. Butterfield?

Mr. Butterfield: The purpose of this, if the Examiner please, is to show, Your Honor, the comparative size of Moog Industries, Inc., in the manufacture of leaf springs in the automobiles that are now in present use by the consuming public.

Hearing Examiner Kolb: Will you read the question, Mr. Reporter?

(Question read.)

Hearing Examiner Kolb: You mean by that the total value in dollars?

Mr. Butterfield: The total value in dollars of Moog springs.

Hearing Examiner Kolb: For what period of time?

Mr. Butterfield: At the present time.

Mr. Mayer: In springs?

Mr. Butterfield: Yes.

Hearing Examiner Kolb: By present time, do you mean for the past year? (Part 3, Page 990.)

Mr. Butterfield: Well, covering the period of time in which the automobiles that are now in use have been operating.

Hearing Examiner Kolb: The witness may answer.

The Witness: What is that?

Hearing Examiner Kolb: You may answer.

The Witness: In the popular price car today, which I won't name, but one that is the most popular, the leaf springs on the rear would be valued at $31 a pair, and the coil springs on the front would probably be valued at $15 a pair, making a total of all springs on the vehicle $46 at retail. Does that answer your question?

As to how many present American automobiles are on the highways, for which Moog manufactures parts which can be used in the operation of those cars, there are 52 million cars and trucks now on the highways. The parts that Moog manufactures, or can manufacture, can be used to replace some parts on or about 95 to 98% of those vehicles. Our catalog does not cover all of the applications involved in the possibilities of replacement. As to leaf springs and the percentage of those 50 million cars that are at present using springs competitively to those manufactured by Moog Industries, we have manufactured a few thousand springs in the past 34 years that this company has been in operation. It is very difficult to tell how many cars they have been installed on, but I do know that 52 million automobiles take 208 million springs, and the total of all the springs that we have ever manufactured, from the date of our inception up to the present time, would be a very small portion of that, much less than 1%, and probably 1/50 or 1/100 of one percent.

Hearing Examiner Kolb: As I understood the question, it was whether or not the springs would fit those cars.

Mr. Butterfield: 95 per cent is the answer.

The Witness: 95 to 98 per cent was my estimate.

Hearing Examiner Kolb: For springs as well as other parts?

The Witness: Yes. Of course I was referring mostly to springs, because we can possibly make a spring for any car.

Hearing Examiner Kolb: Of course, of the 50 million cars on the roads today, there would be a very small proportion of those that would have your springs, isn't that true?

The Witness: That is true. They are mostly on post-war cars. We, in our market analysis, realize the number of automobiles now on the road are approaching that age which requires a complete overhaul of getting more every year. However, in any period of large production, such as we have just been going through, you have mostly new cars on the road and, consequently, not too heavy a demand. We do not supply original equipment to a very great extent, and therefore we would miss that market (Part 3, Page 993). We have to wait until people wear them out and try to sell ours in competition with everyone else. At the present time the only springs we manufacture that go into original equipment are to trailer manufacturers, if they can be classed as original equipment. We do have some trailer equipment accounts and they are rather recent. In the last two years we have supplied no springs to any of the automobile or truck manufacturers.

Q. You stated, Mr. Moog, that about 60 per cent of that replacement business is now being marketed by the car manufacturer. That applies to springs, as well as other parts?

A. Yes, that is the average on all the parts. I was not referring particularly to springs. In fact, the percentage on springs may not be exactly equivalent, but it would fall generally within that category.

Q. Would it be within five or ten per cent of that amount?

A. I would assume so, Mr. Butterfield, since springs generally follow the pattern of most other parts, give or take a few per cent.

Q. Do you know from whom the car manufacturer secures the supplies that he is now marketing?

Mr. Mayer: I object (Part 3, Page 994).

Mr. Butterfield: I asked him if he knew.

Mr. Mayer: The question is purely irrelevant.

Hearing Examiner Kolb: That is irrelevant. I sustain the objection.

By Mr. Butterfield:

Q. Calling your attention to piston rings, Mr. Moog, what percentage of these 50 million cars do you make piston rings that can be used and are satisfactorily in use in those cars, piston rings manufactured by you?

A. We manufacture a line of piston rings that go up to a ring diameter of almost six inches, and therefore, we could produce for replacement, or for original equipment, rings for approximately 95 per cent to 98 per cent of all of the vehicles now on the road. We miss those very heavy vehicles usually known as off-the-road earth-moving equipment, where the diameters go up much higher.

Q. You don't mean you actually supply 90 to 95 per cent of the cars that are now on the road, do you?

A. No.

Q. What percentage of the cars that are now on the road do you supply piston ring replacements?

A. A very small percentage. We have been in the piston ring business since 1934, and in that time our ring operation has been relatively small. We are what is known as one of the minor ring companies, of which there are quite a few (Part 3, Page 995).

Q. How many employees do you have in your ring department?

A. I could not answer that exactly, Mr. Butterfield, but if you give me a moment, I think I can count them out. I believe there are between 35 and 40 in all phases of the ring division.

Q. Would you manufacture as many as 1-1/1000th of one per cent of the piston rings that are sold in any one year.

A. It would run a little higher than that, but I doubt if it would approach 1-100th of one per cent.

In pricing our piston rings, we have the same discount type of schedule that we have for our other articles as is published to the general trade.

Q. And is that discount schedule essentially the same discount schedule that the major piston ring manufacturing companies use at the present time?

Mr. Mayer: I object to that question. I think the best evidence of that would be the price list of the various piston ring manufacturers.

Hearing Examiner Kolb: Read the question, Mr. Reporter.

(Question read.)

Hearing Examiner Kolb: I will sustain the objection (Part 3, Page 996).

By Mr. Butterfield:

Q. Do you know what discount schedule on the published price list the major piston ring manufacturers are using at the present time? Do you know what they are using?

A. Yes, sir; I do.

Q. And in your pricing practices in piston rings, do you, in good faith, attempt to meet those prices?

Mr. Mayer: Mr. Examiner, I object to that question. He has got a conclusion right in the middle of it, which should be decided by the Examiner in this case.

Hearing Examiner Kolb: You have got to quit getting the witness to put in matters which have no relation to the question as a whole. The objection will be sustained.

By Mr. Butterfield:

Q. Mr. Moog, in pricing your piston rings, do you employ any discount schedule, published discount schedule relating to your published price list, other than those which you find necessary to meet the equally lawful prices of your competitors, in order to prevent your competitors from taking your customers away from you?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: Sustained (Part 3, Page 997).

As to what we do in connection with our pricing of piston rings, in chronological order, we do the following:

We determine to the best of our ability what the competitive situation is in regard to piston rings. We sell piston rings on a consignment basis, because our competitors do so. There is no difference between the way they sell piston rings on consignment and the way we sell them. We have a department which determines the makeup of each set of rings, and then, based on the competitive situation, cost of distribution, cost of manufacture, and cost of selling, we publish a price list. There is probably more detail to it than that, but I think that just about tells what we do. Yes, there is a discount schedule applicable to that price list (Part 3, Page 998). At the time we entered into the piston ring business, that was the general practice in the industry. I do not have with me now the price list or discount schedules of the major piston ring manufacturing companies, but I can furnish them.

At this point the Trial Examiner, in the absence of the schedules referred to, granted permission to defer the evidence of those to the next hearing (Part 3, Pages 999, 1,000).

During my experiences over many years in the automotive business, I believe our competitors' prices are lawful, because I have not been informed, nor have I seen anywhere that they have been declared unlawful; so there is no other course for us to pursue in the competitive situation.

Q. Have you any facts which would lead you reasonably to believe that your competitors' prices are made other than to meet competition in your industry?

Mr. Mayer: I object to that. That is a question as to what the competition prices were made to do. The competitors would be the only people competent to answer that question.

Hearing Examiner Kolb: The objection will be sustained.

Mr. Butterfield: At this time, Mr. Examiner, I would like to inquire of counsel if it is his intention, or his understanding, that in order to properly try the defense in this case it is necessary for us to try each and every competitor of ours in this same case? Is that what I under-

stand you to mean, that we must prove the lawfulness of our competitors' prices?

Mr. Mayer: You have the burden of the defense, Mr. Butterfield, you put it in.

Mr. Butterfield: Well, I would like to hold the case within some reasonable limits. I don't want to be forced to try a complaint case against each and every competitor within the confines of this case. If that is what you think I have to do in this case, in order to prove a lawful defense, I suppose there is nothing else for us to do, but I can see no end to this interminable litigation, if that is your attitude. There ought to be some shortcut method, or way of determining this without going through this with every competitor of ours, because there is nothing that we do that is different from that which our competitors do, and I am attempt- (Part 3, Page 1001) ing to show in this case that that is our situation, and that is the essence of the competition that we have to face. Now, there was nothing put in the case on direct which indicated that our competitors did anything other than what we do, because in the case in chief there was no showing of any injurious effect, or any showing of a substantial lessening of competition or any evidence of any intention to create a monopoly.

All that was done in the case in chief was to put in certain price differences. It put us at a terrific disadvantage to have to negatively prove something that isn't in the case on affirmative proof. If that is what you want us to do—

Hearing Examiner Kolb: Are you not trying a 2(f) case here this afternoon?

Mr. Butterfield: No, Your Honor, we are trying a 2(a) case.

Hearing Examiner Kolb: It sounds to me like you are putting in a 2(f) defense. I don't know. Maybe I am wrong. I don't see whether a competitor's prices are made to meet another competitor's prices, I don't see where that has anything to do with this case. If you feel it does have something to do with it; then you have to prove it.

Mr. Butterfield: A 2(f) case, as I understand it, is a case against a buyer for knowingly receiving an unlawful discriminatory price, proved to have been unlawfully discrim- (Part 3, Page 1002) inatory under section 2(a) of the Act. That is, as I understand, a 2(f) case. There has been no showing here of any unlawful prices yet. We are attempting to put in our defense. I made a motion at the close of the government's case, in effect, for a directed verdict, but I will have to cover these things blindly until I find what it is that the government is relying upon, or until the government will restrict its position to something that I can meet head-on.

Hearing Examiner Kolb: The case in chief has been put in showing differences in prices to certain customers.

Mr. Butterfield: Without any effect having been shown on competition or a tendency to create a monopoly, or any injury to, or the prevention or destruction of competition.

Hearing Examiner Kolb: If that is your position, and you feel you are correct on that, let us rest your case.

Mr. Butterfield: I would be willing to rest the case. I would be willing to do it, if the government would restrict some of the testimony to a reasonable number of these documents, instead of these hundreds of thousands of invoices and figures, and these hundreds of commodities.

Hearing Examiner Kolb: You are talking about hundreds of thousands of invoices in this record. Where are they? Let us get this thing straight.

Mr. Butterfield: I will show you, Your Honor.

Hearing Examiner Kolb: Anybody picking up this (Part 3, Page 1003) record would think there were hundreds of thousands of invoices involved in this case.

Mr. Butterfield: I don't know whether the record is up here or not, but in Birmingham, Alabama, which is in Exhibit 67, covering sales in the following amounts: $687.61, $870.27, $1,951.30, and $463.21, there are four dollar figures there, for a total of approximately $3,000.

Hearing Examiner Kolb: What are the invoices?

Mr. Butterfield: Now, the invoices, as I remember the record, there are 500-some-odd invoices in those $4,000. There are about 500 invoices in there.

Hearing Examiner Kolb: You mean the average invoices? $10 an invoice or less?

Mr. Butterfield: Just about. There are about 500. I think the record will show it. I am just quoting it from my memory.

Hearing Examiner Kolb: All right, let us go ahead.

Mr. Butterfield: Just a minute. Included in those 500 invoices there is another item of $436.27 and one of $417.52.

Hearing Examiner Kolb: We are just encumbering the record, Mr. Butterfield. I don't think there is any use going any further on that.

Mr. Butterfield: It is altogether about $700,000 worth of invoices there for that 500 invoices there (Part 3, Page 1004).

Hearing Examiner Kolb: And you were talking about hundreds of thousands of separate invoices.

Mr. Butterfield: Yes.

Hearing Examiner Kolb: I don't think your client does that amount of business in one year, in the period covered by the exhibits.

Mr. Butterfield: The period covered by the exhibits is from 1946 to 1950, if Your Honor please. There are four years of invoices in here.

Hearing Examiner Kolb: All right.

Mr. Mayer: I might add that does not apply to each and every exhibit. There are some exhibits which are outside the year 1949. The majority of the rather lengthy tabulations are confined to 1949, the majority of them.

Mr. Butterfield: I just wanted to call Your Honor's attention to the fact that here in one town there are—

Hearing Examiner Kolb: Do you agree, Mr. Mayer, that there are hundreds of thousands of invoices filed in this proceeding?

Mr. Mayer: I don't believe there are, if the Examiner please, but I fail to see the relevance of that, if there are. The tabulations were checked and cross-examined on by Mr. Butterfield. Obviously there was some check made

of the pure tabulation work done by the accountants, and I fail to see what the examination of the invoices in and of themselves (Part 3, Page 1005) is going to prove as a matter of defense.

Mr. Butterfield: The Commission accounts did not examine but a very, very insignificant number of invoices. Most invoices the Commission's accountants never examined at all, never looked at, to see what was contained in them.

Hearing Examiner Kolb: The invoices which were examined and used as a part of the tabulation were the only ones involved in this proceeding, are they not?

Mr. Butterfield: It is those invoices in the tabulations that the Commission's accountants never examined, they never examined the invoices at all.

Hearing Examiner Kolb: They accepted the figures you had.

Mr. Butterfield: They took the dollar figures off of the books.

Hearing Examiner Kolb: They accepted your books as correctly reflecting the invoices.

Mr. Butterfield: They did not take our books which reflected the commodities that were sold, they just took the dollar figures off of our books.

Mr. Mayer: That is not quite right, either. They were broken down by the lines as the Moog bookkeeping department breaks them down. I might add that the invoices that are actually a part of the record, hundreds of them, were put in by the respondent, not by the counsel supporting the com- (Part 3, Page 1007) plaint. There is a binder full of invoices already in this record, which we did not put in.

Mr. Butterfield: No, because your tabulations did not reflect commodities. For instance, in Alabama there was only one customer that bought piston rings down there, and your tabulation seems to indicate he was getting a different price than other customers who were buying piston rings, when they did not buy piston rings at all. That is in this record, and that is the reason for putting in the invoices, to show the dollar amounts do not reflect commodities of like grade and quality.

Mr. Mayer: I think we have been over this many times, if the Examiner please.

Mr. Butterfield: The piston ring is certainly not in competition with the leaf spring, or a tie rod end, or shackle, or coil spring.

Hearing Examiner Kolb: Do you have any further questions?

All of our customers do not buy our complete line. We have customers that are known as piston ring specialists (Part 3, Page 1007). These piston ring specialists generally buy only piston rings. We have customers who are leaf spring specialists. We call them spring service stations. I believe we also have customers known as wheel alignment specialists.

Hearing Examiner Kolb: Mr. Butterfield, is it your position that there are certain customers on these tabulations that are wheel alignment specialists?

Mr. Butterfield: Yes, Mr. Examiner.

Hearing Examiner Kolb: Don't you think the proper way to prove that is to have him point out the ones that are?

Referring to Commission's Exhibit 79-A, showing sales to Birmingham, Alabama, to three customers, in the approximate amount of $4,500.00, I know of the companies Alabama Auto Parts Company, C. E. Davey & Company, and Dixie Spring Service (Part 3, Pages 1008, 1009). Two of those three companies are specialists. C. E. Davey and Company are specialists in piston rings; Dixie Spring Company is a spring service station, that we refer to as a spring specialist; Alabama Auto Parts Company is what we term a full-line jobber. A spring specialist is one who specializes in that particular line of under-chassis work and repairs springs himself, and is usually known in his area as the best source of that particular product, and consequently sells a good many springs. A spring specialist distributor customer of ours will use some of the springs we sell him in the repair of cars himself (Part 3, Page 1009). A spring specialist uses a furnace and raw steel and manufactures springs from that raw steel if he has the furnace equipment. I know very few spring specialists that do not have furnace equipment.

We do not exercise any control over what our customer does with the merchandise after he buys it from us. He can sell it for whatever price he wants to sell it for, or in any manner in which he wants to sell it, or he can use it himself (Part 3, Page 1010).

In developing our pricing, the major thing that we bear in mind, I would say, would be our cost more than any one factor. As to whether we sell any of our products below cost of manufacture, it is quite possible some may be sold that way, although we try not to do so. We cease to make that item if we can't make a profit on it. Or, in other words, to close out an obsolete line, we might have to sell at below cost in order to competitively dispose of it. Yes, we do buy merchandise from other manufacturers which we re-sell. We sell coil springs and we also sell coil action parts (Part 3, Pages 1011, 1012).

On Commission's Exhibit 79-A, these coil springs are included in the tabulation of leaf springs, coil springs, and chassis parts. We do not manufacture coil springs. We have never manufactured coil springs. We do not buy any leaf springs for re-sale. We do buy some coil action parts for re-sale.

Q. Are there any coil action parts that you both manufacture (Part 3, Page 1013) and buy, the same item?

A. Yes, although that is not the normal method of doing business. If you want me to expound on that, I will.

Q. I wish you would.

A. We might run into an extreme shortage of some particular item and unable to get the raw steel, we will then proceed to try and buy the raw steel, if it is available, from some mill or other source, and if it is unavailable, then, in order to satisfy our customers, we will attempt to buy the item wherever we can get it, provided it meets our specifications and tolerances. That does not happen very often, that we are forced on the market for something that we normally produce ourselves.

Q. Are there other instances in which you may be forced to buy on the market things that you ordinarily produce yourself, besides the shortage of raw steel?

Mr. Mayer: I object to that question. That has no relevance at all to this proceeding.

Hearing Examiner Kolb: It will be sustained.

There have been periods during the pendency of this complaint when our company could not supply any of its products to its customers (Part 3, Page 1014). For instance, a strike in 1950 for eight weeks left us without manufacturing processes.

At this point, on motion of Commission's counsel to strike the last three questions and answers on the ground of irrelevancy, the Trial Examiner sustained the motion to strike the last three questions and answers.

Referring to Commission's Exhibit 79-A, Selma, Alabama, I am not familiar with the Selma Service and the Selma Auto Parts Company.

Referring to Commission's Exhibit 79-A and 79-B, I am not familiar with the names of the companies in the State of Arkansas that I recognize to be specialists in one line or another (Part 3, Page 1014-A).

With reference to Commission's Exhibit 79-A and 79-B, referring to the State of Florida, there are some specialists in Jacksonville, Consolidated Automotive Company which operates a spring service station; Horton & Company operates a spring service company; Southern Piston Ring Company is a piston ring specialist.

In Tampa, Tampa Piston Ring Supply Company is a piston ring specialist, to the best of my knowledge. I am not too familiar with the Tampa jobbers. I do not believe that Southern Piston Ring Company is in competition for the same parts manufactured by Moog as is the Consolidated Automotive Company and the Horton Company. I don't know about the Tampa specialists. I have been to Jacksonville recently and that is why I know about them. I haven't been in Arkansas for a good number of years. Where I have been I have had a chance to look at the customers and can give you some information on them.

I will look on this list of 23 States here and tell you those of my own knowledge who were specialists at the time these exhibits were prepared, covering the period and years stated in the exhibits (Part 3, Page 1015).

I do not know about those in Georgia. The Raleigh Drennon Axle and Spring Company is a spring specialist. I believe that the Auto Wheel and Axle Service in Louis-

ville is a spring specialist. The Auto Chassis and Spring Company is a specialist and, I believe Dealers Truckstell, a chain store out of Memphis, is a specialist. I know it is not a full-line jobber. I am not certain of the type of operation they have. They are not what is known as a full-line jobber. I do not believe that they are any longer located in New Orleans. They have a place in Memphis. I am not familiar enough with most of these accounts except places I have actually been, in order to be qualified to state exactly who specializes and in what. For the last eight or nine years I have been more of a front office man. It was only since Mr. Apple died that I have been traveling. You do not see a customer's place when he visits you, and I am only able to describe those that I have actually been in their town and called on them (Part 3, Page 1016).

McKee-Moog Spring Company is a specialist in Memphis.

Truett-Worrell Spring & Aligning Company is a spring specialist in Dallas.

Cole Spring Company is a spring specialist in Houston.

Odessa Spring and Axle is a spring service station in Odessa, Texas.

All of the items in that line are not interchangeable with other items in the same line, like salt or beans. They are a group of commodities which all have a special functional purpose of their own. For instance, leaf springs that fit various models of cars are of course different. They have to be. There is some interchangeability within certain makes on certain springs, but it is relatively small (Part 3, Page 1017). We receive orders for some leaf springs that we have to manufacture by hand. There is a difference in cost in manufacturing these various springs. We started manufacturing piston rings, I believe, in 1935 (Part 3, Page 1018).

Since we entered the piston ring field in 1935, there has been a general practice in the marketing of piston rings to grant a cumulative, retroactive rebate similar to the one that is now used, and that practice was in effect in the industry at the time we entered the piston ring business and is in effect now with a great many of our competitors

(Part 3, Page 1020). As to what was done in the marketing of piston rings when we went into that business: When I joined the company in 1935 my uncle was the operating head of the company. It was his practice to try and explain as much as possible his operational practices because he felt that some day it would be necessary for younger men to step in and help; and I feel I am fairly familiar with what went on, even though at that time I was not in management but was in the factory working at the end of a furnace. It was explained to me that in this new industry which we were entering, that it was necessary that we conduct ourselves in the same manner that other people who had experience in this industry were conducting themselves, and it was with that thought in mind that we took the step to meet competition on the same basis (Part 3, Page 1021).

Mr. Apple was sales manager of the company at that time. I was present at some conferences with the sales manager at that time and since that time, respecting granting of these cumulative retroactive annual rebates. We met the competitive situation in the best way we knew how. We evolved a contract every place which would not put us at a competitive disadvantage (Part 3, Page 1022). What we are now doing to meet the competitive pricing practice in the sale of our automotive products is to change our schedule wherever it is necessary to meet a situation that arises. All moves, naturally every move that we make is made in order to either prevent the loss of a certain group of our customers to our competition or in some way to protect ourselves in this competitive enterprise system (Part 3, Page 1024).

In 1946 there were approximately 6500 automotive jobbers that could have been potential customers of Moog Industries, and how many there were in 1947, I do not know. The only figures I have were after the war, when they were counted. There are now 11,000. In 1946, Moog had approximately 500 active jobbers (Part 3, Page 1025). As to how many active jobbers we have today, I can only estimate that the same way we estimated our 1946 jobbers who were active, and we have now in the neighborhood of approximately 775.

A good many of the companies in the Piston Ring Industries at the present time utilize a marketing practice of cumulative annual retroactive discounts.

Q. Are there any other lines that Moog manufactures that use that method of marketing, in other products? * * *

The Witness: Most of the rebates granted, I believe in the other industries are generally of the non-retroactive type (Part 3, Pages 1026, 1027).

As to the Regal Manufacturing Company, I am familiar with them only to the extent that they are a competitor of ours in Coil Action Parts. They are one of our lesser competitors. I am not as familiar with them as with some of the others (Part 3, Page 1027).

I am acquainted with the Geary-Hershey Company.

Q. I show you Respondent's Exhibit 6-A, Confidential Jobber Price Schedule 4. Is that the price list that corresponds to the price list that you use on commodities to sell your customers?

A. This is the confidential jobber price schedule. We have one of the same color.

Q. And these are published prices, are they not?

A. That is true.

Q. To jobbers and distributors?

A. Yes.

Q. Where they use the word "jobber" you use the word "distributor" which means the same thing?

A. Yes, distributor.

Q. And you translate these part numbers into part numbers on the Moog catalog, do you not?

A. That is right. In this particular instance, as most of (Part 3, Page 1028) the parts are similar to our own, they use a different prefix.

Q. Can you select an item there as an illustration?

A. Yes. G2521 is the Geary-Hershey equivalent to the Moog No. 521.

Q. Now, this jobber price of $13.73, do you know what discount schedules are applicable to that?

A. I believe the G-H organization have a discount from their jobber net, and I think it was 20 percent.

Q. On what quantities was that based?

A. It was based on all quantities.

Q. On all quantities?

A. Yes.

Q. Now, this distributor's price list, Exhibit No. 12-B, of Regal; is there a part comparable to 521 on that?

A. Moog No. 521. Their number on that would be our 521.

Q. Their price shown on here is $3.62, and Geary-Hershey shows $3.73. It is 3.62 on Regal's No. R521, and Respondent's Exhibit 12-B, $3.62 distributor's price, and the comparable price on Geary-Hershey, Respondent's Exhibit 6-A is $3.73. Now, do you know offhand, what the price is of Moog? We have got it shown here in these exhibits of Moog.

A. I haven't the slightest idea.

Mr. Butterfield: Have you got these price lists?

Mr. Mayer: Obviously these price lists are going to speak for themselves. The matter is printed on there, isn't it? (Part 3, Page 1029.)

Mr. Butterfield: Can I have just that one item?

Mr. Mayer: Yes, you can have it.

(Short interruption.)

Hearing Examiner Kolb: On the record.

By Mr. Butterfield:

Q. You haven't with you the 1951 price list on this item No. 521, have you?

A. No, I do not.

Mr. Butterfield: I am afraid, Your Honor, we will have to defer this, because the exhibit that is in the record here is the 1949 year. We will have to furnish that exhibit, then, for the year 1951, and I ask to defer that matter at this time.

Our principal competitors in the sale of Moog automotive products are as follows: All of the car manufacturers, including the various General Motors Division: Chrysler

Corporation, including its four divisions, which are generally grouped together for parts purposes under the name of Mopar; Ford Motor Company and its Lincoln and Mercury divisions; as well as the independents such as Studebaker, Nash, Kaiser-Frazer, Willys, Hudson, et cetera (Part 3, Page 1030). Then in addition to that there are manufacturers competing with us in the independent field; such as Thompson products and its associate Toledo Steel Products, Sealed Power Corporation, McQuay-Norris, and Aluminum industries. They are our major competitors.

Q. Yes, major competitors. Does the General Motors group have a competitor comparable to this Mopar of Chrysler as a competitor of yours?

A. Not exactly, yet they do compete with independent replacement manufacturers in the replacement field with their United Motors organization. However, I am happy to state that they do not sell within the United Motors organization any item that is directly competitive with our own manufactured item (Part 3, Page 1031).

United Motors group does not sell items competitive with the products that we manufacture, but General Motors does. General Motors sells only through their own facilities. They do not go through the independent jobber. They sell directly to their car dealers. That car dealer is an outlet that competes directly with customers of our customers.

It is very difficult to meet General Motors competition. We attempt to meet it in several ways: One is to provide a part of equal quality. The second, we try to have that particular part available to the trade for immediate use. And, third, we must price it so that it can be sold competitively against the pricing structure of General Motors (Part 3, Pages 1032, 1033).

As to your question, do we follow the General Motors prices, we are certainly guided by them and where we can we try to compete on a basis that is equivalent to theirs. We do not sell directly to any General Motors car dealer, but we hope that our customers, the automotive jobbers, will pursue that type of business and sell as much as possible through those outlets. He must do that or else he nor-

mally would not have enough volume to maintain his organization and pay himself a profit, unless he did sell to car dealers. It is my belief there is not sufficient volume in this industry, working only through the independents, to hold the independent jobbing organization together (Part 3, Page 1033). I would say that the jobber must sell to the car dealers in order to survive (Part 3, Page 1034).

June 24, 1953, Washington, D. C.

HUBERT C. MOOG resumed the witness stand and testified on behalf of Respondent as follows:

As to the General Motors' method of distributing automotive replacement products, practically all of them are made and distributed by the car manufacturer. They are sold directly to their dealer organization from the main factory parts division. As to how the General Motors determines the distribution through the car dealer or United Motor Service, I am not too familiar with the methods used, except certain lines made by certain of the subsidiary companies of the major motor car manufacturers are distributed through the independent jobbers, and this grouping together of these lines by the subsidiary companies, of, for instance, General Motors, is termed United Motors Corporation, which has its headquarters in Detroit (Part 3, Page 1036). Their other lines are distributed direct to the car dealer. As to Chrysler products, they are distributed through their Mopar set-up. It is a grouping together of all of the Chrysler divisions to distribute their parts to all of the various dealer-channels, and normally they maintain warehouses in each fairly large community, and distribute the Mopar line out of these warehouses. It is possible for a car dealer to order direct from the car manufacturer. However, the factory ships under the Mopar label, no matter how it is forwarded to him. In other words, the Mopar warehouse in each city is not their only means of distribution, it is just their local warehouse for immediate delivery. They also ship from their factory to the car dealer (Part 3, Page 1037).

Ford Motor Company, to the best of my knowledge, ships parts from their various warehouses and also from their home factory to their car dealers, without recourse to an organization such as Chrysler has set up. They merely term their parts "Fomoco," standing for "Ford Motor Company," and distribute in that manner.

I believe in general all of the motor car manufacturers distribute in practically the same way, whether it goes through one channel or another. It is really very similar, excepting in the one instance that the General Motors people have set up one little portion of their competitive situation to go through the independent jobber and they call it the United Motors line (Part 3, Page 1038), and I know of no other major car manufacturer who has deviated in a similar fashion, yet I believe that all the others can be classified as a very similar type of distribution.

We do not sell our products to car dealers. I believe that practically all of our customers sell to car dealers.

As to how we meet this competition of the car factory to the car dealer, we make an effort to place our distributors in a position to meet that competition, price-wise, quality-wise and service-wise, and our discount schedule applicable to our distributors net prices are designed with that object in mind (Part 3, Page 1039).

Q. Do you have available the car dealers' prices?

A. Yes, we have them on file.

Mr. Butterfield: If Your Honor please, I would like to defer that evidence, and I will put that in at the next hearing.

Hearing Examiner Kolb: I don't see what the car dealers' prices, at which he sells to his customer, has anything to do with this case at all.

Mr. Butterfield: The charge in this 2(a) complaint is injury to competitors, and the car manufacturer is one of the major—the three major car manufacturers are the major competition to Moog Industries, and it is for that reason that we have to meet the competitive injury to the car manufacturer, because that is the charge that has been made against us.

Hearing Examiner Kolb: Go ahead.

It would be far too difficult to give you a complete list of our other competitors in the automotive products field (Part 3, Page 1040).

We compete directly with a good number of people, and the ones I have mentioned heretofore are just those names familiar to everyone as being very large in the car field. There are also probably hundreds of competitors who are approximately our size and smaller. I can give you some breakdown on this and go as far as I can. For instance, in the leaf spring field our competition ranges from the large ones, such as Marmount Automotive Products of Chicago. Then there is Tuthill Spring Company, an organization of approximately our size, like that. I would say there are probably 16 or 18. Then we go all the way down to include those whose prominence is just of a local nature, or in one State, and there are at least 10 or 12 of that size. Then we go down to the lowest category of spring manufacturers and those include the larger spring service stations that do some manufacturing and distribution on their own in their cities, and are relatively limited as far as distribution goes, yet they are a factor at any one place at any one time. For instance, one example: We have an account, Western Spring Company, who buys from us those items which it is economical for them to buy from us, and they produce for themselves certain other items, for various reasons. Those reasons may be it might be cheaper for them to make one item in their area than it would be to buy that item from us and have it shipped (Part 3, Pages 1041, 1042). Then there is the factor of availability that enters into it. That covers the leaf spring line, I think, down to the lowest common denominator.

We then go into competition in our coil action line, which includes such people as Geary-Hershey, Regal, Bastin, and a considerable number that we just don't have a list of and it would be difficult for me to call all of them to your attention, but more or less as you go down the list they become only a smaller factor in a certain area.

Then in the coil spring line, some of the bigger competitors are Burton Auto Spring Corporation and Eaton Products of Cleveland, and then there are several others

who probably purchase their springs and do not manufacture them.

In the chassis parts field, such as tie rod ends, king bolts, and shackles, our competition ranges from Shefford-Master Corporation in Fairfield, Illinois, and a number of others. Most of the others, however, either manufacture or distribute multiple lines. It is difficult to separate them. When you get down to this category it is difficult to separate them into individual line of manufacturers (Part 3, Page 1042).

To my knowledge, none of our competitors duplicate exactly our lines of distribution. They may handle almost as many different lines of parts as we do, or they may handle more lines than we do, but they do not exactly duplicate our line. For instance, we are one of the few leaf spring manufacturers who also make and distribute other parts. We have a unique position in that respect.

As to consumer advertising on a national or local level, we do practically no such consumer advertising (Part 3, Page 1043). Our larger competitors do use consumer advertising. Depending upon the company, it may go to any media that is effective for them. It may be telephone; it may be radio; or it may be newspaper or magazine. Normally these major competitors that advertise do not advertise these parts to the consumer as parts. They advertise because when you go into the field of the major car manufacturers and their advertising, they play up the theme to the car owner, such as "Bring your car back home to the dealer," or "Don't use gyp parts" or "Only use genuine parts". Usually they try to hit upon some catch phrase—that of inferior quality (Part 3, Page 1044).

At this point, Commission's counsel moved to strike the latter answer as not relevant, and the Trial Examiner sustained the motion.

The witness was then asked if he manufactured any so-called gyp parts, which was objected to and objection sustained.

Q. Mr. Moog, how do you meet the competition which has, through the national consumer advertising of your major competitors been built up?

Mr. Mayer: I object to that question. It contains a conclusion in it, about how the competition is maintained by the competitors.

Hearing Examiner Kolb: Sustained.

We feel that national consumer advertising by any of our competitors is a factor in the competitive marketing picture which we must meet in the distribution and sale of our products (Part 3, Page 1045). We meet that factor in several ways. We first price the item so that it is attractive to the trade that we are aiming at. Second, we have to make it available, if possible in all levels of distribution. Third, we feel that it is necessary for us to place every bit of quality that we can in our own product, and speaking only for Moog Industries, we, in our trade advertising, make the statement, if I may quote it here, that Moog makes a part as good or better than the one it replaces.

Q. Do you use the expression in your advertising of "genuine parts"?

Mr. Mayer: I object to that. That is not relevant.

Hearing Examiner Kolb: Sustained.

Mr. Butterfield: Do I understand, Mr. Mayer, that you are not charging us, in 2(a), with injury to competition with our competitors?

Mr. Mayer: You are charged with injury to competition.

Mr. Butterfield: With competitors?

Mr. Mayer: Any injury to competition which results directly from your pricing practices, and you know it.

Mr. Butterfield: I would like to have you point out in the record one injurious competitive effect that you maintain has flowed from these charges, and the record which (Part 3, Page 1046) you have made, just one.

Mr. Mayer: We have been over this many, many times, Mr. Examiner. I move that this examination proceed.

Hearing Examiner Kolb: If you have any questions to ask the witness, go ahead.

With reference to Commission's Exhibit Number 66, coil action sales and rebates to jobbers in Denver, Colorado, on the last line, Western Spring Company, as to whether

he is a Moog jobber or a Moog competitor, actually I believe Western Spring Service Company can be termed as both. That is the same Western Spring Service Company that I referred to as a manufacturer a few moments ago. I know of no other similar organization (Part 3, Page 1047). They are located in Denver and their business is the manufacture of springs. They also manufacture some springs. As to what quantity, I cannot definitely determine, but I do know they order from us only the so-called popular items, which would, in effect leave someone in their own organization to produce some of the unpopular numbers.

Yes, we do have fluctations in the prices of our products (Part 3, Page 1048). That occurs as often as the competitive situation requires, consistent with the cost of raw material, cost of sales, and cost of shipping. Every time a competitor makes a move of some type, we have to take it into consideration in our over-all picture, and a good many times it does affect the price. That is why we publish price lists from time to time and why our picture is a constantly fluctuating type of thing. We are not able to meet all prices of our competitors. We try to be guided by the car manufacturers' prices, since those are the ones we must compete with at the consumer level (Part 3, Page 1049).

We are not able to successfully meet competition on leaf springs on the West Coast, the reason for that being high shipping costs. We feel that we can successfully meet competition in the East Coast area, the Atlantic Coast, since the average freight cost is not as excessive as shipments to the West Coast (Part 3, Page 1050).

I believe I know the difference between so-called hard competition and soft competition. That part of the industry dealing with products that we sell I would say is intensely hard competition.

Q. Mr. Moog, do you understand what is meant by an unlawful pricing practice?

A. It is difficult to understand exactly what is an unlawful pricing practice. I firmly believe that everything we have done in the business has been in good faith. I don't believe that we have ever operated in such a manner as to try to do any harm to anyone, except that we do want to

protect ourselves at all times, so we do not lose our customers, and our distribution. We have tried to act, at least since I have been actively engaged in this company, we have always tried to act in such a manner so that we could keep our heads (Part 3, Page 1051) up and look squarely at anyone, and, to my knowledge, we have not engaged in any, what I would call, unfair pricing practices.

Q. You have not, Mr. Moog, at any time, had any agreements with any of your competitors, have you, in respect to fixing prices?

Mr. Mayer: I object to that. That is not material.

Hearing Examiner Kolb: The objection will be sustained. That is not involved in this case.

I do not believe that at any time since I have been with the Moog organization have I known the company to do anything which would have the result of forcing any of our competitors out of business.

Q. Have you, since you have been with the Moog Industries, or has the company, either, during that period of time, done anything which you would consider to have the effect of injuring any customer of a customer of yours?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: The objection will be sustained.

By Mr. Butterfield:

Q. Have you, since you have been with the Moog Industries, have you or the company, to your knowledge, done anything (Part 3, Page 1052) which you would consider to have the effect of injuring a customer of yours?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: Objection sustained.

By Mr. Butterfield:

Q. From your many years in the automotive industry, have you an opinion as to whether or not there is any possibility at the present time, or in the future, of your company monopolizing any line of commerce in which you are engaged?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: Sustained.

By Mr. Butterfield:

Q. Mr. Moog, I ask you if you have an opinion, based upon your experience in the automotive industry, as to whether or not the present share of the market to which you testified yesterday Moog is manufacturing and distributing, there is any reasonable possibility of having any substantial effect on competition in any line of commerce in which you manufacture products for sale or distribution?

Mr. Mayer: I object.

Hearing Examiner Kolb: Sustained.

By Mr. Butterfield:

Q. Has there ever been brought to your knowledge, Mr. Moog, before the filing of this complaint by the Federal Trade Commission, or since the filing, any fact which would lead (Part 3, Page 1053) you reasonably to believe that there was an injury by virtue of any pricing practices that you have or are now engaged in, in injuring competition?

Mr. Mayer: I object to that.

Hearing Examiner Kolb: The witness may answer. Overruled.

The Witness: May I have that question again?

Hearing Examiner Kolb: Read the question, Mr. Reporter.

(Question read.)

The Witness: I don't believe I have seen any evidence of injury from our business.

By Mr. Butterfield:

Q. Has any fact been brought to your attention, either before the filing or since the filing of this complaint, any injury to any competitor of yours?

Hearing Examiner Kolb: That question has been answered in the previous answer.

By Mr. Butterfield:

Q. Has there been brought to your attention, either before the filing of this complaint, or since the filing of this complaint, any fact which would lead you to believe that there had been any destruction of competition by

virtue of Moog's pricing practices, which they have and are now engaged in? (Part 3, Page 1054).

Hearing Examiner Kolb: That question has been answered.

By Mr. Butterfield:

Q. Mr. Moog, has there been brought to your attention or knowledge any fact which would lead you reasonably to believe that Moog Industries, Inc., by its pricing practices, either before or since the filing of this complaint, had done anything to prevent competition with Moog Industries, with the customers of Moog Industries, or with the customer of a customer of Moog Industries?

The Witness: May I have that again?

(Question read.)

Hearing Examiner Kolb: The witness has answered that. There is nothing, to his knowledge, that would affect competition and injury to competition. I think all these questions are within that answer. I don't see any occasion for asking it again.

Mr. Butterfield: This last question embodies some factors that were not expressed in the other question. Will you read my last question, Mr. Reporter?

(Question read.)

Mr. Mayer: I wish to object to that question, upon its being re-read, Mr. Examiner. I don't see the relevance of this line of questioning.

Hearing Examiner Kolb: Objection sustained (Part 3, Page 1055).

Mr. Butterfield: May I ask you again, counsel, for the reason of your objection?

Hearing Examiner Kolb: Off the record.

(Discussion off the record.)

Hearing Examiner Kolb: On the record.

Mr. Butterfield: I would like to make an offer of proof, if Your Honor please, that H. C. Moog, the executive vice-president of Moog Industries, having had experience in Moog Industries for twenty years, would testify, if allowed to testify, in answer to the question as to whether there had been, to his knowledge, or to the company's knowledge, any fact brought to its or his attention

that would reasonably lead Moog Industries, Inc., or himself to reasonably believe that Moog Industries, Inc., prevented competition, either with a customer, a competitor, or a customer of a customer, and that if asked that question he would testify that there had not been any such fact ever brought to the attention of himself or the company.

Hearing Examiner Kolb: Mr. Butterfield, we have been seriously criticised by the court for the long records that we have in these cases. I have sustained the objection, and I refuse to permit you to ask certain questions, because that question has been answered and covered by the witness' previous answer. There is no occasion at this time for making any offer of proof or anything further on that proposition (Part 3, Page 1056).

The objections to any further questions on this line will be sustained, and no offer of proof will be accepted. Go on to something else.

Cross Examination.

Our published price lists, reflecting our distributors' net prices, are our regularly announced prices which are circulated to all of our customers, and sales are actually made as a matter of regular course according to the terms announced on those price lists (Part 3, Page 1057). The springs that we sell to the trailer accounts, that I have mentioned, are sold only for original equipment purposes. I do not know whether or not any of these sales include replacement springs, as I do not, myself, handle that particular part of our operation.

As to the question when did we first offer a rebate on any of our lines, to our customers, when I first joined the company on a full-time basis, we had at that time acquired a piston ring company, and the operation of that company was such that we accepted their policies when it was acquired, and their policy at that time was one of discounts. That is the beginning of my recollection of so-called volume discounts (Part 3, Pages 1058, 1059). I am not familiar from the beginning with the institution of rebates on the coil action line. At that time I was traveling on the road gaining sales experience. That was probably

the period of 1938, 1939, and 1940. The rebate plan on the leaf spring line was instituted when I was a member of the management of the company, and I was present during that period. As to which of our competitors in the leaf spring line also had a retroactive bonus plan at that time, I cannot answer that question because I don't know the situation that existed competitively at that time in that one industry (Part 3, Page 1059).

It is possible for our piston ring customers to re-distribute piston rings.

Q. Do you have any concrete knowledge, as a fact, of any piston ring specialist of yours who does not sell piston rings, redistributes them, let us say, to a garage customer who comes in to buy piston rings manufactured by Moog?

The Witness: I can't state that I have any knowledge of anyone who doesn't.

By Mr. Mayer: Well, as a matter of course, isn't it logical to assume that they do redistribute, to a certain extent.

A. I would suppose that it is.

Q. And that would be true as well in the leaf spring line, wouldn't it? (Part 3, Page 1060.)

The Witness: I cannot state that, Mr. Mayer. * * *

I am familiar with the McKee-Moog account in Memphis. Yes, I would say that McKee-Moog does redistribute.

While I denominated them as a leaf spring specialist, they probably overlap somewhat. He may distribute, but he also performs the other function at the same time.

Q. Now wouldn't this generally be true as well of the wheel alignment specialists, that they can redistribute certain Moog products to mechanics or garage customers who approach them to buy various Moog parts used in wheel alignment?

A. Well, I can't speak for them all, Mr. Mayer, nor do I know any specific one that I can refer to, because I am not familiar with those accounts, at their place of business, as to exactly their function. I have really tried to

keep my testimony down to those people that I actually know (Part 3, Page 1061).

Q. Well, as you have been characterized by your counsel as a man of twenty years' experience in this field, do you have any personal knowledge of, or have you ever known a single wheel alignment specialist customer, whom you have known as such, who has not redistributed?

A. Generally, Mr. Mayer, the wheel alignment specialist buys from our distributors, he does not buy directly from us.

Q. Generally speaking.

A. Well, it is very difficult to answer a general question with a specific answer.

Q. I think it has been cleared up a little bit by the fact that they purchase as a rule from your distributors instead of directly from the Moog plant itself.

A. If they perform the function of putting the piece on the car, that generally makes them a purchaser from our distributor, unless they also provide another function of stocking and distributing themselves.

Q. Now, Mr. Moog, you don't have any doubt, do you, that your customers, located in the same general area as, specifically, Memphis, Tennessee, compete with each other in the resale of your products, do you?

Mr. Butterfield: I object to that question, unless you relate it to a specific product.

Hearing Examiner Kolb: Objection overruled.

Mr. Butterfield: I take an exception (Part 3, Page 1062).

The Witness: I would state that they do not necessarily compete with each other on all products.

By Mr. Mayer:

Q. Well, let us perhaps put it this way: It would be possible, wouldn't it, for a ustomer to get the same part in Memphis, Tennessee, the same Moog part, from either J. B. Cook or McKee-Moog, or Ozburn-Abston, or Mills-Morris?

Mr. Butterfield: I object to that, as to the possibility of getting a part. The question is whether they did get a part.

Hearing Examiner Kolb: This is cross-examination, Mr. Butterfield. The objection is overruled.

Read the question, Mr. Reporter.

(Question read.)

The Witness: It would be possible under conditions where these distributors handle the same line of products for some of them to obtain similar products.

By Mr. Mayer:

Q. For instance, what I was driving at, you do not have any such thing as an exclusive franchise, as when you have three or four customers in one particular locality, and where (Part 3, Page 1063) one customer is only allowed to buy a certain portion of the leaf spring line and another customer is only allowed to buy the coil action portion, and another customer only buys a certain portion of the piston ring line, there is no such exclusive contract by Moog as to who can purchase such product within that line, is there?

Mr. Butterfield: I object, Mr. Examiner, because there is nothing in my examination, or there is nothing in the record, that refers to any exclusive contracts with Moog Industries.

Hearing Examiner Kolb: Overruled.

The Witness: I would say that if a distributor is authorized to purchase, he meets the qualification of the company to purchase, he may purchase within that line whatever he desires.

By Mr. Mayer:

Q. All right, sir; now, I believe in answer to one of Mr. Butterfield's questions you stated that sometimes price changes are made in individual prices, or the pricing structure of Moog Industries is changed sometimes to keep individuals as customers, or groups of individuals as (Part 3, Page 1064), customers, and I wondered, sir, if you can give me an example where Moog Industries has made a price change to keep a single customer, a one-line customer.

A. Yes, sir. I will have to recollect, though, because we recently made a change in the price of a certain overload extension, when we found it was not competitively

priced, and at the customer's request we reviewed the fact and changed the price. Actually, the customer was one of the first to notify us, but we acted as soon as we could, to retain his business.

Q. Was that pricing change made to all customers?

A. Yes, it was published, then, as a price change. It required the distribution of a complete set of blue sheets.

Q. Now, all right, sir. What was it about the competitive situation which brought it to your customer's attention to inform you that the overload spring was not competitively priced?

A. The price of our kit was far different than the price of several other competitors, and therefore we felt we were too far away to attract business and reduced it to somewhat within reason of a competitive price.

Q. What basic considerations did you take into account when you made the price originally on that overload spring? What part did your competitors' prices play in that determination?

We were the first one out with the set (Part 3, Page 1065).

I will try to name you the piston ring manufacturers who use an annual volume rebate in their system of pricing, to the best of my knowledge. I can say almost all of them do. Ramsey Corporation, Hastings Manufacturing Company, Sealed Power Corporation, McQuay-Norris, and Perfect Circle Corporation. All of those I know and some of them I have not paid much attention to. I can't answer as to how many of those have identical rebate schedules to the rebate schedules offered by Moog. I can only do that by comparing their schedule with ours, face to face. We don't ever try or want to have anything exactly like everybody else. We want to tailor our operation for our customers, ourselves, as well as we can. We meet objections, of course, and we try to get what is good for us and something that our customers can sell. I don't know whether I explained that very well.

Mr. Mayer: Mr. Examiner, I feel necessarily somewhat limited, in the absence of the actual price list, and so forth, of these competitors. I understand Mr. Butterfield is go-

ing to introduce them at a later hearing. I would like to then, perhaps, go into the cross examination more thoroughly about the competitors' practices and prices.

Hearing Examiner Kolb: All right (Part 3, Pages 1066, 1067).

As to whether any of our customers compete with any car dealer in an effort to re-sell Moog products, that is a very intricate situation. I believe I may state that our customer both sells to and competes with the car dealer. We do not sell direct to any car dealer. When I talk about competing with General Motors, I am talking about our customers' problem in selling Moog products.

There is no competition, as I understand it, between G. M. and Moog in the sale of Moog customers, is that correct?

Mr. Butterfield: I object to that question, because it—

Hearing Examiner Kolb: Just a minute, Mr. Butterfield. If you are going to give reasons which will lead the witness (Part 3, Page 1067) in making the answer, I will have to have the witness step outside. You can make your objection and he can come in again.

Mr. Butterfield: All right, I would like to have him step out, and I would like to discuss the objection to that question.

(Whereupon, the witness left the hearing room.)

Mr. Mayer: There is nothing wrong with that question.

Hearing Examiner Kolb: Off the record.

(Discussion off the record.)

Hearing Examiner Kolb: On the record.

Mr. Butterfield: I object to that question, if Your Honor please, because the competition of the car manufacturers to the car dealer is one of the major problems in this whole automotive industry, and that is a question that is deliberately put to mislead this witness. I wish to state this on the record in the absence of the witness. I wish to call Your Honor's attention to the complete unfairness of this type of question, and to allow this question to be asked is highly prejudicial to the position of the respondent in this case, and it is such a flagrant violation of due process to

allow such prejudicial question to be asked that it amounts to a denial of the process under the Fifth Amendment to the Constitution (Part 3, Page 1068).

Hearing Examiner Kolb: This is cross examination. The witness has been asked the question and, I suppose, is able to answer the question. He has been put on as an expert, and you said he is an expert.

Mr. Butterfield: He is an expert. It is his life.

Hearing Examiner Kolb: All right, I have ruled on it. Let us get the witness and let's go ahead.

Mr. Mayer: I might say I do not particularly appreciate the charges in that statement, but I refuse to answer.

(Whereupon, the witness returned to the hearing room.)

Hearing Examiner Kolb: Read the question to the witness.

(Question read.)

The Witness: I don't believe I can answer the question, based on the way it is stated.

Hearing Examiner Kolb: Read the question again to the witness, Mr. Reporter.

(Question again read.)

By Mr. Mayer:

Q. What I was trying to clear up, Mr. Moog, was your idea about the competition which Moog has to meet, or attempt to meet, from G. M., and on what level of distribution that competition is.

A. I can answer that, Mr. Mayer (Part 3, Page 1069).

Q. All right, sir, if you will.

A. All right. Our competition, competition with the car manufacturer, with G. M., I think you mentioned specifically—

Q. Well, if the answer can be related, I would like to have you relate it to all the car manufacturers, if possible.

A. It is the fiercest kind of competition in all phases met with by our distributors and we believe that this competition is one of the most important factors relating to our ability to sell.

Q. As I understand it, then, the competition is between the Moog distributor and the car dealer outlet for the car manufacturer, is that so, sir?

A. That is true.

Q. Now, when you talk about price competition, then, are you talking about the price at which you sell the Moog distributor or the suggested resale price which the Moog distributor in some instances, or many instances, follows in selling to his customer?

A. I was not referring to any schedule except our distributor schedule, because that is the only one that we would really have any hold of. That is the ony one that we ourselves can do anything about, or want to.

From the distributor out, that is his business, and it is up to him to compete, if he can. We do feel that we must put our distributor in a position to compete, though, because he cannot operate without a profit, that we know (Part 3, Page 1070).

Q. You must, of course, in the make-up of these prices, have detailed knowledge as to the prices which the G. M. factory charges the car dealer for competitive parts, is that so, sir?

A. Yes, sir; we have detailed knowledge of what the car manufacturer charges to his dealer for competitive parts.

Mr. Mayer: I would assume then, Mr. Examiner, if Mr. Butterfield will also supply those prices—

Mr. Butterfield: Yes, I said I would. I will do that at the next hearing. I said that yesterday.

By Mr. Mayer:

Q. And by the same token, then, the car manufacturer prices, which you testified concerning earlier, which must determine the Moog prices, are the prices from the car manufacturer to his dealer outlet?

Mr. Butterfield: I object to the use of the phrase "by the same token" unless it is explained.

Hearing Examiner Kolb: Overruled. * * *

The Witness: I can only answer that, Mr. Mayer by saying we have to take into consideration the car manufacturers' prices in setting the distributors' price.

By Mr. Mayer:

Q. My question was, which prices are those, the prices of (Part 3, Page 1071) the manufacturer to his dealer, or the prices at which the dealer offers his merchandise to be sold?

A. Well, we take into consideration all phases in setting up distributor prices. There is some consideration given to the factory price set to the dealers; there is some consideration given to the factory recommended price to the garage, and some consideration given to the factory-recommended list price, because all of those have to be taken into consideration.

Q. When you talk about intensively hard competition, that also applies to the ability of the Moog distributor to sell Moog parts, does it not, sir?

A. I don't believe I understand you, Mr. Mayer.

Q. Well, the competition existing, as I understand it, between Moog and its competition to sell its parts also exists down on the distributor level, of the Moog distributor in an effort to sell his Moog parts, does it not?

A. I can only answer as far as our own problems are concerned. I am not familiar enough with the distributor problems to be able to answer that.

Q. Will you give us an example, Mr. Moog, in your experience, of what you consider an unfair pricing practice?

Mr. Butterfield: If Your Honor please, I don't think that is quite fair, since all the questions I asked on that were sustained (Part 3, Page 1072). * * *

Mr. Butterfield: And, furthermore, the other objection that I wish to make to this is that the charge in this complaint is a violation of Section 2(a) of the Act, and there is no charge, as I understand it, under section 5 of the Federal Trade Commission Act of unfair competition. If that is an issue in this case, I would like to know it.

Hearing Examiner Kolb: If there are any additional statements you wish to make, Mr. Butterfield, let us put them in now and let us get them over with. The pending objection is overruled.

Mr. Butterfield: I take an exception to that ruling.

Hearing Examiner Kolb: Let the record show the objection and the exception to the Hearing Examiner's ruling.

Read the question, Mr. Reporter.

The Witness: I cannot answer that question.

By Mr. Mayer:

Q. You cannot answer that question? You mean it is physically impossible to recall?

A. It depends on what is called—what is it, unfair—(Part 3, Page 1073).

Q. Pricing practice.

A. What is the definition of an unfair pricing practice?

Q. That is precisely what I want to find out from you, sir. The answer to the question on direct examination was that you have not engaged in any unfair pricing practices, I understand.

Mr. Butterfield: No, "unlawful" was the word used on direct examination. If I used the word, "unfair," it was done merely inadvertently, because the word I intended to use was "unlawful."

Mr. Mayer: We are going to get to that. You used the word "unfair."

Mr. Butterfield: Well, I wish the record to be corrected, and I would like to have him re-answer the question, using the word "unlawful."

Hearing Examiner Kolb: As I understand it, Mr. Witness, you do not know what an unfair pricing practice is.

The Witness: No, sir.

Hearing Examiner Kolb: Is that your answer.

Mr. Butterfield: If Your Honor please, in reference to that question that you have asked this witness, the witness only asked the attorney to define what he meant by "unfair."

Hearing Examiner Kolb: He said he could not answer the question, that he did not know what "unfair" meant.

Mr. Butterfield: What the attorney meant by the use of the word "unfair" (Part 3, Page 1074).

Hearing Examiner Kolb: How much more do we get into this record? Read the question to the witness, and let him answer.

Read the original question, Mr. Reporter.

(Question read.)

The Witness: I asked the attorney to define the word "unfair", or at least to tell me what he means by that, and I will try to answer to the best of my ability.

Mr. Mayer: It seems obvious that the question is not going to be answered, so to clear this up, let us ask the witness to give us an example of an unlawful price. There won't need to be any question about whether that was answered on the direct examination.

The Witness: Well, I would like to also ask what Commission's definition of an unlawful price is, and perhaps I could—

By Mr. Mayer:

Q. That is precisely what I am trying to find out from you, Mr. Moog, as to what you think an unlawful price is, and to do that, I ask you to give me an example, in your experience, where you have seen or observed an unlawful price.

A. Sir, I haven't, to my knowledge, seen an unlawful price, because I understand from what you stated that that would injure competition (Part 3, Page 1075).

Q. Well, in your opinion, then, sir, since this was gone into on direct, is there such a thing as an unlawful price?

A. There may be, Mr. Mayer, but I don't believe that we have ever—

Q. The question was not directed to Moog, so just eliminate that from the answer. In your experience, I take it, you have never seen what you think is an unlawful price, is that correct?

Mr. Butterfield: I object, unless it is confined to the industry in which Mr. Moog engages.

Hearing Examiner Kolb: Overruled.

The Witness: May I have the last question read?

(Question read.)

The Witness: Without an exact definition, I would have to state I don't believe I have seen one.

There is not contained on our price lists any terms of sale. That is in our contract (Part 3, Page 1076).

By Mr. Butterfield:

Q. When you answered the first question that was asked by counsel, as to the Moog distributor price list, you understood and assumed that that included the distributors' contract in addition to the price list, did you not?

A. Since he was talking about terms, I had to, Mr. Butterfield, because that is where they appear.

Mr. Butterfield: That is all I have.

Mr. Mayer: Before we adjourn, or go off the record, I would like to make a statement.

Yesterday, in answer to Mr. Butterfield's motion, I think I made some statement about what the respondent was entitled to and what he was not entitled to, and I certainly did not want to be misinterpreted in the light of having had a discussion a good many times about what the complaint involved, both on and off the record. Certainly the respondent is entitled to know at all times what the complaint is directed to, and we are at all times willing to furnish that information. That is all I have (Part 3, Page 1077).

Mr. Butterfield: That is all I have today.

Hearing Examiner Kolb: What about further hearings?

Mr. Butterfield: I have got to put these price (Page 1077) lists in, and I had hoped that I could have selected one or more of these terms that we have been through, or selected one or more years than we have covered, to direct my cost studies towards, and that was the purpose of my motion. We are going to have to decide on whether or not it is worth while, from a financial standpoint, for the respondent to try to meet, in that respect, every item shown on these exhibits, or whether we are going to take our chances and select one or two of the communities, to put that in. It is a terrific risk, because we may go into a very expansive cost study, and then have that restricted strictly to the particular community and be held not to have attempted to defend against any of the other charges

in the complaint. Now, that is the decision that we are going to have to make.

Hearing Examiner Kolb: Mr. Butterfield, you had over a year to make that decision. How many more years will you need?

Mr. Butterfield: Well, we have called in cost accountants to make these studies, and based on what we can reasonably assume, it will cost us in the neighborhood of several hundreds of thousands of dollars, and perhaps, in the nature of a million dollars, to make the cost justification defense, such as has been made in these other cases, in order to meet all of the charges here in all these items (Page 1078), because it requires the taking of 75 per cent of all of our invoices for a period of six or more years, and it requires going through a period from 1936 to date.

Hearing Examiner Kolb: You advised the Hearing Examiner that you had whatever cost study you proposed to introduce ready and in the hands of the attorneys of the Commission by the latter part of April this year. That was several months ago. The case was continued for the purpose of giving you an opportunity to do that.

Today it appears this thing hasn't even been started.

Mr. Butterfield: We have made these tests, and samples. I had no idea what the enormity of these cost studies would be.

Hearing Examiner Kolb: You had in mind cost justification at the time this case was filed, did you not?

Mr. Butterfiel Oh, yes, very definitely.

Hearing Examiner Kolb: And yet you have done nothing about it, and you come here three years later to tell me you are thinking about whether you are going to have a cost study made or not. You are just making a farce out of the whole thing.

Mr. Butterfield: That is not my intention.

Hearing Examiner Kolb: I am trying to give you an opportunity to have a fair trial in this proceeding, and I am willing to go to any lengths to do it, but I cannot tie (Page 1079) this case up indefinitely for years while you make up your mind as to what you are going to do. You have got to make up your mind as to what you are going to do sooner or later in order to finish this case.

(Discussion off the record.)

Hearing Examiner Kolb: As the result of a discussion off the record as to the possibilities of further hearings, it is hereby ordered by the Hearing Examiner that a hearing be set for Thursday, August 6, 1953, to run for two days, at St. Louis, Missouri, for the purpose of completing the testimony by the Respondent, unless good cause is shown (Page 1080).

September 15, 1953, at St. Louis, Missouri.

HUBERT C. MOOG was recalled as a witness on behalf of Respondent, and testified as follows:

Direct Examination.

At the last hearing in Washington, I promised to bring in detailed lists of car dealers' prices, and I have brought them with me this morning. I also have brought in some of the price lists and schedules of our competitors.

At this point they were marked "Respondent's Exhibit Number 14," being the distributors' net cost, blue sheet Form 878, effective September 7, 1953, of Moog Industries, consisting of 12 pages.

Respondent's Exhibit Number 14 was offered and received in evidence.

Respondent's Exhibit 14 is our distributors' net cost sheet. I have compared the prices in part in this cost sheet with the net price list for Ford dealers, issued by Ford Motor Company (Part 3, Page 1083). As a comparison, for example, our kit Number K-32, was equivalent to a particular number listed in the Ford chassis parts catalog, No. 883049, entitled "Kit Front Suspension, Upper Spindle Support." Our price on that item is 96¢ net to the distributor. The Ford Motor Company does not have a distributor. They have a dealer and the dealer's price is listed in competition with our distributors' price to the dealer (Part 3, Page 1034). The Ford price to the dealer is listed as $1.20 if the Ford dealer uses it himself, and there is a 19¢ wholesale incentive if he re-sells it under the wholesale trade net

to the garage man or the filling station. The net cost to the Ford dealer, if he re-sold it, would be $1.01. Based on our blue sheet I know what the margin of operation of our customer is (Part 3, Page 1085). That margin would be the difference between his purchase price of 96¢ and a selling price to meet that competition of $1.01, which would be 5 cents, based on a $1.01 selling price, a little less than 5% (Part 3, Page 1086). I believe our suggested re-sale price lists, which are already in evidence, concern the situation about which we are now testifying. From Respondent's Exhibit 14 I will pick an item for comparison with the same item in the Chrysler catalog, our Item Number K-83, which has an equivalent in Mopar Chrysler Corporation Part No. 1326078. Our distributors' net cost on that item is $1.24; the Mopar price is $1.36. Mopar allows a discount from that price, depending upon the quantity purchased at one time by the dealer (Part 3, Page 1087). I believe that that discount is 10% if the order is over $1,000.00. I also believe there is an additional discount if the order is somewhat higher than that. I am not sure of this, but I believe it is $2,500.00. I believe also that the discount mentioned to me is 5%, and there is also an additional discount allowed by them of 2% for cash. They allow no redistribution discount that I know of.

I will select an item for comparison with our price list from the General Motors price list. There is a Chevrolet passenger parts book known as the Chevrolet price schedule. I have an item here listed as Moog's K-25, which is equivalent to a number listed in the Chevrolet Parts Book Number 603412, a steering knuckle support pivot pin replacement unit, Moog's net cost sheet shows a net of 65¢ to the distributor. The Chevrolet price to their dealer is 81¢ (Part 3, Page 1088). Chevrolet allows a 12½% rebate, based on, I believe, copies of invoices submitted to the manufacturer of sales of certain items of which these parts are included, when the sale is made to the wholesale market, such as garages, filling stations, et cetera. In answer to your question, does that 12½% rebate apply only to Chevrolet parts, my answer is "No." It applies to any part within that category that the Chevrolet dealers resell, whether they are Chevrolet parts or any other part.

I assume the dealer would get the rebate if it was a part manufactured by Moog, if he reported the re-sale, since I have been advised that they are so reported, and, to my own personal knowledge, I believe that to be the general practice.

These parts that I have selected from the Ford, Chrysler, and General Motors catalog and price list, have been selected by me at random (Part 3, Page 1089), and I have examined other prices of other parts and compared them with our prices. We keep these car manufacturers' catalogs and price lists in order to determine the price which we must offer to our distributor to allow him to be able to re-sell Moog parts.

At this point, Respondent's Exhibit Number 15 was marked for identification. Respondent's Exhibit 15 was then handed to the witness and asked him to identify it (Part 3, Page 1090). This document seems to be a supplementary jobber contract between Wausau Motor Parts Company and some unnamed jobber whose name is to be filled in, which in short states the amount of credit to be paid to a jobber seeking Wausau rings on the schedule from $1,200 and 2 percent up to $40,000 and a 25 per cent rebate. That rebate seems to be retroactive.

Respondent's Exhibit 15 was then offered and received in evidence (Part 3, Page 1091).

Wausau Motor Parts Company is one of our competitors. In constructing our prices and discounts schedule we must have taken this document into consideration.

At this point, Respondent's Exhibit 16, consisting of three pages in one sheet, Respondent's Exhibit Number 17-A-B and C, consisting of three pages, stapled together; Respondent's Exhibit 18-A and B, consisting of five pages on two sheets; Respondent's Exhibit 19-A-B and C, consisting of three pages, stapled together; Respondent's Exhibit 20-A and B, consisting of five pages on two sheets; and Respondent's Exhibit 21-A-B-C-D and E; were all marked for identification. Thereupon Respondent's Exhibits Number 16, Number 17-A-B and C, Number 18-A and B, Number 19-A-B and C, Numbers 20-A and B, and 21-A-B-C-D and E were offered and received in evidence (Part 3, Page 1094).

The witness was then shown all said exhibits and requested to identify them. These are Thompson Products, Inc., full line franchise agreements from 1949, 1950, 1952, and 1953; also Thompson's jobber franchise and Thompson's local distributor agreements, the last two being undated. Thompson Products is a competitor of ours. These documents indicate the items on which they are competitive with us. Those items, reading from the 1953 distributor's franchise, are Piston Rings, stabilizers and shock absorber links, independent front wheel suspension parts, spring shackles, Harris products, tie rod sockets, king bolt sets, chassis bolts, and bushings (Part 3, Pages 1094, 1095). All of these agreements that Thompson had with his jobbers were taken into consideration in framing our price lists and constructing our sales schedules and discounts. The purpose of that was to meet the competition of Thompson Products line. As to the relative size between our company and Thompson Products on these items in volume on the individual lines, I am not at all sure, but on the overall size of the company, according to the Thompson report, their sales were something over $400,000,000 last year and ours were less than $5,000,000, making a difference in size of eighty times.

On motion of counsel for Commission to strike the answer on the ground that it was irrelevant unless the comparison was made on the basis of the items sold by Moog in competition with items sold by Thompson Products, the Trial Examiner sustained the objection and the answer was stricken (Part 3, Page 1095).

Q. Mr. Moog, on those items which you refer to in the Exhibits 16 to 21 both inclusive, being manufactured by Thompson and manufactured by Moog, are those same items in the car manufacturers' list of parts which they manufacture?

A. They must be since all of these are replacement parts and as such they would have a corresponding number found in the car manufacturers' catalog and pice lists.

The car manufacturers sell all these parts to the car dealer. These car manufacturers' price lists and catalogs are extremely important to us in the operation of our business. We could hardly operate without the informa-

tion that is contained in them, consisting of the parts numbers and the prices of those part numbers (Part 3, Pages 1096, 1097). Those prices, as shown in the car manufacturers' catalog, in some cases include incentives or discounts and in some cases they do not. The car dealers do not sell to the Moog distributors, to the best of my knowledge. The car dealers sell to other car dealers, to garages, filling stations, specialty shops, such as brake shops, spring shops, and others, as well as to the car owner.

I have brought with me other price lists and price schedules of other competitors of Moog's. I have brought a series of price lists from Regal Tool and Manufacturing Company, Inc.; another set from Hirshey Metal Products, Incorporated; another set from Ramsay Products; another set from Hastings Manufacturing Company; another set from McQuay-Norris Company (Part 3, Pages 1097, 1098). I have the price lists which indicate therein the applicable discount or the net price of each, net prices recommended to each portion of their distribution. All of these companies I have just mentioned are also competitors of ours. Some of them employ discount schedules comparable to ours (Part 3, Page 1098).

At this point, Respondent's Exhibit Number 22, being a series of five price lists of McQuay-Norris Manufacturing Company; Respondent's Exhibit Number 23, a series of five price lists of Hastings Manufacturing Company; and Respondent's Exhibit 24, a series of four price lists of Ramco; were marked for identification (Part 3, Page 1099).

Thereupon Respondent's Exhibit 22, Pages 1 to 133, Respondent's Exhibit 23, Pages 1 to 92, and Respondent's Exhibit 24, Pages 1 to 37, were offered and received in evidence.

Respondent's Exhibit Number 22 is Price List Number 22 of the McQuay-Norris line, which became effective November 1, 1951, on all parts in the McQuay-Norris line, both the consumer price, the wholesale trade net, the preferred buyer franchise net prices—these are their recommended prices—the amount suggested, suggested volume buyer franchise net prices, and the confidential net prices on piston ring sets and parts. Besides volume or retroactive discounts, non-retroactive discounts from these price

lists, McQuay-Norris has rebate lists from their distributors' blue sheet schedule (Part 3, Page 1100). These rebates are not shown on this exhibit. The only commission shown on this exhibit is a supplemental commission which is given to a distributor of McQuay-Norris when he sells to a dealer a part for the dealer's own car on which McQuay-Norris allows a supplemental commission.

This enables a dealer to meet the competition of the car manufacturer, and enables the distributor to meet the competition of the car manufacturer with the dealer.

As to what the other discounts are, I am not familiar with their exact schedule, although I do know that there is a McQuay-Norris discount rebate which is non-retroactive. Yes, I believe I can get one of those discount rebate schedules of McQuay-Norris.

Respondent's Exhibit Number 23 is the price lists of Hastings Manufacturing Company, but all the discounts and allowances that Hastings gives to its distributors are not shown on these exhibits. Their rebate schedule is not attached. I probably can get a copy of one somewhere (Part 3, Page 1101).

Respondent's Exhibit Number 24 are the price lists of the Ramco line. These price lists do not reflect their discount schedules. I know they have a discount schedule, but I do not know from memory what it is. I probably can secure one.

All of these three named companies are competitive with Moog Industries in the manufacture and sale of automotive parts. We use all of these price lists in order to form our own prices and our suggested prices in order to compete with these people (Part 3, Page 1102); and in constructing our discount schedule we took into consideration the discount schedule of all of these companies in respect to these price lists.

Q. Are the items that are shown in those price lists also contained in the Ford, Chrysler and General Motors catalogs?

Mr. Mayer: I object to that on the grounds of irrelevance.

• • •

Hearing Examiner Kolb: The objection will be sustained.

Thereupon, Respondent's Exhibit Number 25-A, B, C, and D, being McQuay-Norris Manufacturing Company's discount schedules, consisting of four pages, were marked for identification (Part 3, Page 1104).

Thereupon, Respondent's Exhibit 26-A through 26-Z-14, and being Ramco contracts, consisting of forty pages, were marked for identification, and both of said exhibits were offered and received in evidence.

The witness was handed Respondent's Exhibit 25, and asked to describe how the discount schedule therein operated. This McQuay-Norris discount schedule is, as stated on the face of it, an earned premium discount from the distributors' prices, retroactive on piston rings and piston expanders and non-retroactive on all other products. It is retroactive from $3,000.00 at a 5% rate, up to $30,000.00 at a 20% rate, and non-retroactive from $5,000.00 at a 2% rate to $65,000.00, and over at a 10% rate (Part 3, Pages 1105, 1106).

The witness was then handed Respondent's Exhibit 26-A to Z-14 and asked to describe how the discount schedule therein operated. The Ramco discount schedule is actually similar to the others except that it is based on a time turnover of the stock consigned by the Ramco people or Ramsay Manufacturing Company to their distributor (Part 3, Page 1106). I am not completely familiar with how that time turnover works but it states in the jobber distributor agreement that Ramsay Corporation pays to the customer of their warehouse a compensation based on the number of times that the consigned material is turned over. It is a little different than the usual type of agreement between manufacturer and distributor and manufacturer and jobber. The greater the turnover that a jobber has, the greater will be the amount of compensation based on the average thousand dollar stock. In percentage, based on a thousand dollar investment unit, if there is a three-time turnover, the compensation to the jobber is $100.00 or 10%; if there is a ten-time turnover, the compensation is $1,050.00, based on $10,000.00 worth of volume, which is actually $50.00 better than 10%, making it 10½% (Part 3, Page 1107).

There are also a group of manufacturers that manufacture and distribute the same kind of parts that we do, other than the independent manufacturers and the car manufacturers that I have named and described above (Part 3, Pages 1108, 1109). This group of manufacturers operate in all different ways. For instance, Aluminum Industries in Cincinnati operate on a straight 20% discount from their blue sheet price. Actually we have to look at every phase of our competitve manufacturers and determine how best to enable the jobbers that we bid for to deal with, to pick us out of the group and deal with us. I could go on and name other manufacturers who operate somewhere in and between our picture and the other picture; some give 10% off; some give 20% off; some give various discount schedules, all of them attempting in their own way to service a certain segment of the independent field and the dealer field (Part 3, Page 1109).

As to whether there is available to all of our customers these various sources of supply that I have described, our customers are subject to the whims and caprices of any customer anywhere, they can walk into any manufacturer, any store anywhere they want and buy anything they want, and if you do not appeal to them, somebody else will. They have a great deal of choice and every day letters come across my desk telling me about customers who have left us and gone to other sources. Then there are new accounts which want to buy from us, and we have to check their credit. In my travels, part of my job is to find out why people have left us and I go to see these accounts that have left us, along with those who have joined us. I try to please those who have joined us and I try to find out why we have displeased those who have left us, and the reasons therefor are varied (Part 3, Page 1110). We have additional competition other than that which we have just described. First, after we have succeeded in combatting the competition at the distributor level, then of course we must combat the competition from that point on down, at least help our distributor to combat it by giving him the tools to work with and the profit necessary for him to compete against in getting our products away from his shelf down into the consumer's cart. In our competition picture

there is also a device by which groups of manufacturers combine to distribute their products, co-operatively (Part 3, Page 1111). One of them is NAPA organization. They operate by group together to sell to a selected combination of distributors several lines of parts, to the exclusion of all others and in offering complete lines from top to bottom that the distributor needs to operate on, so they have in that particular store all segments of the industry required to go out and service other people. That runs from ignition to batteries, to car parts, to accessories, through the whole gamut of auto repairs and replacement. We do not belong to any such organization.

Q. And what has been the effect upon your selling, by this full line of parts distribution set-up of NAPA?

Mr. Mayer: I am going to object before the witness answer, to see what defense the respondent is attempting to sustain by this line of testimony, otherwise I think it is irrelevant.

Hearing Examiner Kolb: What is the purpose of the question, Mr. Butterfield?

Mr. Butterfield: The purpose of the question is to show competitive effect, if Your Honor please (Part 3, Page 1112).

Mr. Mayer: The defense is limited to the competitive effect of Moog's pricing policies; certainly the NAPA set-up is no defense to that line of policy.

Hearing Examiner Kolb: The objection will be sustained.

Mr. Butterfield: If Your Honor please, I would like to submit at this time in order to properly appraise the gist of the subject matter of the complaint it is necessary for the respondent to show to the Examiner, in order that the full picture can be had, not only of the effect that Moog's pricing policies have had on its competitors but the effect that Moog's pricing policies have had on Moog, because that goes to the essence of this problem of competitive injury. In this line of questioning that I propose to show, I attempt to bring out—

Mr. Mayer: If he is going to tell what he proposes to show, let's exclude Mr. Moog.

Hearing Examiner Kolb: Will you step out in the hall, please?

(The witness Moog leaves the hearing room.)

Mr. Butterfield: I propose to show and I attempt to point out here that far from Moog adversely affecting its competitors, Moog is in effect being affected far more seriously by the practices of its competitors. Now, take for instance, this NAPA set-up alone. Now, here is a set-up of parts manufacturers of every item that goes into an automobile. They have combined together to select by a device called the NAPA ware- (Part 3, Page 1113) house, where they can offer to a distributor more than Moog's limited springs and front end parts, including these chassis parts, such as coil springs and tie rod ends and shackles, they can offer everything from battery cable to batteries, to tires, to windshield wipers, everything that goes into a car, a complete full line distribution; and it was that effect of these combined manufacturers on Moog that I want to show here, in order to demonstrate to the Hearing Examiner that Moog here is more sinned against than sinning in this thing; and it is the effect of this distribution, the effect of these methods of distribution—

Hearing Examiner Kolb: Well, I do not see how the fact that a particular competitor who sells the whole line while Moog sells a specialized line has any effect upon the issues in this particular proceeding.

Mr. Butterfield: Well, as I understand the issues in this proceeding, that Moog has a virtual monopoly on this particular product; that is the theory of the proceeding, and that if Moog varies or makes any difference in products between various customers they are in effect cut off from any source of supply and to that extent they are discriminated against.

Hearing Examiner Kolb: That is the first time I heard that in this case.

Mr. Mayer: May we go off the record in the interest of limiting the record, showing less argument than it has in the past (Part 3, Page 1114).

Hearing Examiner Kolb: Maybe we better stay on the record as long as we got an argument as to what the issues are.

Mr. Butterfield: As I had understood, I mean from the case that the Government put in and from the nature of the Cross-Examination, and from the remarks of the Trial Examiner, what was really involved here was price differences.

Hearing Examiner Kolb: It is not a question of the line of product. You never heard the Hearing Examiner make any such statement at any time, nor did you hear the attorneys make any such statement, nor does it appear in the complaint. That is not an issue in this case. There is no contention of any kind, any place, by anyone, written or oral, that Moog has a monopoly of a particular line. So that is an issue that is not in this case.

Call Mr. Moog back and let us proceed.

Mr. Butterfield: Well, I would like to make one explanation to indicate to the Trial Examiner what may solve some enigma in this case in as far as our defense is concerned, and that is this, that the issue of monopoly and competition are inextricably interwoven, that unless you have a monopoly pressure or some method by which the market has been corralled to a substantial degree, that you can't possibly have such a thing as an injury in competition because of the free choice of the various customers in going to the various sources of (Part 3, Page 1115) supply, and it is for that reason that I had thought that the attorneys in support of the complaint, the theory that they seem to have proceeded under, was that a mere price difference in and of itself was sufficient, and that it would seem to me would only follow where there was a substantial impact, substantial share of the market where a price difference would have that result and effect because there has been no evidence introduced in this case of any injurious effect, no one has been brought in here to testify that he has been injured adversely and that was the purpose of that examination. I did not want the record to show in any way that Moog had a dominant position in this market or even a substantial significant position in the automobile market compared with his com-

petitors, which we have this morning, Thompson Products, Ford, Chrysler, General Motors, Ramco, which are all organizations of very, very substantial size in direct competition with us, and it was because of this group of manufacturers who had combined to distribute their products co-operatively that has caused Moog and its competitors too, who are not members of the NAPA group to do the things that they have done in order to maintain their position on the market if they could maintain it. I think the evidence in the case will indicate they have not only not maintained it but actually lost.

Hearing Examiner Kolb: Let's save that for argument at the close of the case. There is no use arguing the case (Part 3, Page 1116) every time we have a hearing. Call you witness and let us proceed. Is there any objection pending?

(The reporter read the question as follows:)

"Question: And what has been the effect upon your selling, by this full line of parts distribution set-up of NAPA?"

Hearing Examiner Kolb: The objection to the line of testimony is sustained. • • •

Q. Mr. Moog, at the present time are you contemplating any changes in your pricing practices?

Mr. Mayer: I object. I do not see any relevancy of any contemplated changes to any defense of the charges under the complaint.

Hearing Examiner Kolb: Objection sustained.

By Mr. Butterfield:

Q. Mr. Moog, at the present time do you sell any mail-order houses?

A. We just recently started pursuing that type of account.

Mr. Mayer: I object to that question and answer, and move it be stricken on the basis he is attempting to do now what he could not do directly formerly (Part 3, Page 1117).

Hearing Examiner Kolb: The objection will be sustained and the answer stricken.

By Mr. Butterfield:

Q. Mr. Moog, based upon your years of experience with this organization and in your present position as executive vice-president with full responsibility, do you have an opinion as to what the effect will be upon your market in the event that you eleminate the pricing schedules which are complained of in the complaint filed against you by the Federal Trade Commission?

Mr. Mayer: I object. I do not think that is relevant at all to any defense by the respondent under this complaint.

Hearing Examiner Kolb: The objection will be sustained (Part 3, Page 1118).

Cross Examination.

Referring to Respondent's Exhibit 14, those are our distributors' net prices, effective September 7, 1953, and which are in effect at the present time. These prices are higher than the prices which were in effect in the period of 1949.

Q. And in the answer to Mr. Butterfield's questions of the comparison of the prices from the manuals of the three large automotive manufacturing distributing outlets, those prices were made on a comparative basis of their current 1953 prices, were they not?

A. 1953? This is the current price list. I do not know the date of this price list, I think this is also current. These are used quite a bit.

Q. Well, are those three volumes in current use by Moog now to ascertain the various cost of the items listed in them?

A. Yes, that is right. These I notice are marked July, 1952. This is all 1952, so these must be the ones we are using at the present time but there may be later ones out which we do not have (Part 3, Page 1119).

Q. Now, in the examination of these various documents which are not in the record and comparing them to the Moog distributors' price list which we have made part of the record, have you ever had occasion to make a tabulation or an over-all comparison showing the various prices for the Moog parts to its distributors as op-

posed to the various prices by the big three distributing divisions to its car dealers?

A. Yes, sir, we make comparison between all of our prices and all of the competitors' prices.

Q. And would you have such a document in evidence at your plant at this time?

A. I do not believe there is any one such document. There might be various sheets of various kinds pertaining to certain items. I am sure that they must be based on this new price list. There must be sheets of that type which are still there; some may have been destroyed, some still there.

Mr. Mayer: Well, if the Examiner please, I would like to ask Mr. Butterfield then to submit that to us because obviously there is no way of testing on the basis of one Moog part in each catalog the accuracy of the witness in characterizing that that is a normal part as distinguished from a part which is abnormal in the price structure.

Mr. Butterfield: I will have to find out what kind of working papers these are that the witness refers to.

By Mr. Mayer: (Part 3, Page 1120.)

Q. Well, obviously, they are in existence, aren't they, Mr. Moog?

A. I am sure that there are some.

Q. Because the Moog Company works with them and I am sure that could be done without too much expense or labor involved.

A. You will find that there are some there and these are average parts.

Mr. Mayer: We appreciate that. I think it is necessary to make a complete picture here because otherwise without that information available to us we would have absolutely no way of knowing whether or not any comparison of prices is a normal comparison of prices.

By Mr. Butterfield:

Q. You have employees who assist you in making these up, haven't you?

A. That is right.

Mr. Butterfield: You can bring that in, the working papers, put that evidence in the record.

Mr. Mayer: Well, I think that should at least be made available to us whether or not it should be made a matter of record.

Hearing Examiner Kolb: Do you have any tabulations to show that?

The Witness: Judge, there are a group of tabulations out there and they are all based on prices with all types of (Part 3, Page 1121) competition. They have to be so we can make up our prices, we have to know exactly what our competition is. There are some there, I can't guarantee what have been destroyed but what are there you are certainly welcome to, you can have either original or photostats, whatever you like.

Mr. Mayer: I think the photostats would be satisfactory.

By Mr. Mayer:

Q. Now, Mr. Moog, turning to the distributor prices which you used, for example, for your Moog part K32 as opposed to the equivalent part, the price with which you were comparing it in the Ford manual, isn't it true, sir, that that distributor's net price shown on there as 96 cents for the part might in many instances be subject to the maximum annual volume of rebate offered by Moog on a sale of that item, and in that instance the price might well be 20 percent less than the 96 cents, as it appears, 19 percent less than the 96 cents as it shows on the distributor price list there and also in the testimony concerning customer's margin in this particular instance, the 5 cents being the difference, 96 cents as I take it and $1.01, net cost to the Ford dealer, is that the 5 percent margin you were talking about?

A. That is right.

Q. Now, also in comparing your Moog part K83 as opposed to the Mopar part 1336078, I believe it was stated that the Moog (Part 3, Page 1122) distributor price is $1.24 Now, that price, too, would be subject to any annual volume discount which might apply on the sale of that part?

A. Yes.

Q. Therefore, it is possible that a volume rebate of 19 percent might apply to that particular part in the sale by Moog to its own distributor?

A. That is right.

The only discount which might be allowed by Mopar in some instances on the sale of its parts to its dealers is a discount based upon a single order size. To my knowledge there is no re-distribution discount granted by Mopar on any of its sales.

Q. Now, similarly in the presentation of the price as it appears on the Moog price list for its distributor of the part K25, that part which shows at 65 cents might well be subject to the annual volume rebate or the retroactive rebate offered by Moog, might it not?

A. That is true.

Q. And it could be that that part would be subject to the top rebate of 19 percent? (Part 3, Page 1123.)

A. True.

Q. Now, in the distribution by Chevrolet, I am not quite sure that the record is clear, is this distribution of the part the price which you were comparing in your direct testimony, was that the distribution of the part as it is sold by the Chevrolet Division of General Motors to the Chevrolet dealers, was that it?

A. The price I mentioned of 81 cents?

Q. Yes.

A. Is the price listed in the price list which refers to the price from the Chevrolet parts division to the Chevrolet dealer.

Q. And as I understand it, when the part is redistributed by the Chevrolet dealer to a customer who might be a potential of a Moog distributor, there is a rebate, too, on that sale, is that correct, sir?

A. That is my understanding.

Q. And what is the rebate?

A. According to several people that I have talked to, it is 12½ per cent.

Q. Have you ever seen that published, as a matter of published rebate, statement by the Chevrolet division?

A. I am almost positive that it is not published.

Q. Have you ever seen an invoice to indicate that the 12-1/2 percent has been paid or allowed? (Part 3, Page 1124.)

A. I have asked to see one but I have never been shown, yet everyone in our sales force is cognizant of the fact, and they cover the entire country.

Q. Now, Mr. Moog, if in the process of redistribution a 12-1/2 percent rebate is offered, what then is the actual price that Moog considers that Chevrolet division is selling that part to the Chevrolet car dealer for?

A. 81 cents, Mr. Mayer, because there is nothing we can do about that. We tried to.

Q. No. I am sorry. I did not ask what you do about it, Mr. Moog. What I wanted to know, what price it was you actually determined on, and it is obviously the 81 cents, that is the price you consider the part is being sold for to the Chevrolet dealer?

A. Yes (Part 3, Page 1125).

Referring to Respondent's Exhibit 15, I cannot tell you what the effective date of that document is, nor can I tell you if the document was ever effective (Part 3, Page 1125).

As to where Wausau Motor Parts Company competes with Moog Industries, in the distribution of its merchandise, the Wausau people sell two different lines of piston rings, and I assume they are worldwide. They are well known. Everywhere in my travels I constantly met with Wausau products distributed throughout the United States.

Q. Was this agreement or an agreement similar to this ever offered to one of your Moog customers, to your own knowledge?

A. Mr. Mayer, they printed it.

Q. No. The question was, was it ever offered specifically to one of your customers, to your knowledge, this particular thing?

A. I have never had a jobber tell me specifically it was offered.

Q. Do you know if the Wausau Motor Parts Company offers any other discount on its sales other than those appearing on this?

A. I don't know.

Q. And have you made a comparison of the list price of the Wausau Motor Parts Company to its distributors in comparison to the list price of Moog Industries to its distributors?

A. You say have I made one?

Q. Have you made one? (Part 3, Page 1126).

A. Only summarily.

Q. Now, as I understand it, this document to your knowledge at least, not to your positive recollection, might not have ever been in effect. Now, I would like to know, Mr. Moog, just exactly what part that document plays in the determination of the Moog pricing policy.

A. Well, Mr. Mayer, this was sent in to us by one of our salesmen obviously. We would examine it. We would try to evaluate the effect of Wausau on our market, how close we would have to come to meeting the competitive offer and how far away we should stay because of certain pitfalls which it may lead us into, and upon examination of this we would use our own good judgment and experience to try and work this thing in with all of the others and come out with a contract and a schedule which we feel would earn us the greatest amount of profit and lose use the smallest number of customers and attract the most. In effect, that is the closest I can come to it.

Q. In your recollection, just what part did this particular document play in the formation of Moog prices?

A. Mr. Mayer, I can't tell you that because I don't remember the date that that came in, therefore I can't tell you exactly the exact date.

Q. As I understand it from your testimony evidently there was no attempt to directly match or identically match the rebate plan as it shows on this particular document? (Part 3, Page 1127.)

A. No, sir.

Referring to Respondent's Exhibit 16 through 21-A, which are documents relating to Thompson Products Com-

pany, and as to how we were able to determine prices made by Thompson to its customers, we had available to us, first, Thompson's blue price sheet, and we take those blue prices and compare them to ours, just like we compare our blue prices to other prices all over the industries. These Thompson contracts that are in the record are valuable to us only insofar as they affect us in formulating our own prices.

Referring to Respondent's Exhibit 16 as to what class of customers that contract is offered, it states that it is a full-line franchise and it is offered to the distributor. In order to qualify, under the line there it says "Name of Distributor" (Part 3, Page 1128). I believe that I am familiar with the various classifications and customers within the Thompson sales structure. I believe those documents represent the entire grouping of Thompson contracts, as of the date shown.

Q. Now, sir, in the formulation as I understand it of the Moog prices as a result of your information concerning the Thompson Products method of distribution as well as others, to what individual customer, if any, of Moog was any price change made as a result of these particular agreements after you had weighed them and considered them along with the Thompson prices to its distributors?

A. I am not certain I can point out anyone right now, Mr. Mayer. I will have to go back over my sheets because, as you can see from the date, the effective date is 1949, we obviously formulated certain prices—that would be before the Korean War—and we had obviously formulated certain prices and had based those prices upon the competitive situation at the time trying to hold on to our distribution. Now, we just—if we at that time selected any one particular jobber I can't tell you offhand right at the moment. I might (Part 3, Page 1129) go back over my papers to check to see whether there was any particular complaint registered at the time concerning our prices because we are, we always recognize any justifiable complaint, and if we—

Q. Do you rectify that on an individual basis?

A. No, sir, never.

Q. It is never done on an individual basis?

A. We publish our prices.

Q. Now, sir, directing you to respondent's Exhibit 22, which seems to be some of the suggested prices and other prices of McQuay-Norris Manufacturing Company, would you direct me, sir, to that exhibit which would list comparable prices to the prices you offer to your distributors?

A. Comparable to the distributor's cost sheet?

Q. Yes.

A. It would be their blue sheet starting with page 109. This sheet is dated November 1, 1951, and those prices might still be in effect. I asked for the price list and I don't know whether there is a later McQuay-Norris price out now or not. I can check (Part 3, Page 1130).

Q. Do you recall, sir, whether or not as a result of the information acquired, through the information contained in this price list of McQuay-Norris to its customers, any change was made in the Moog prices offered to its distributors?

A. Would you repeat the question?

(The reporter read the question as follows:)

"Question: Do you recall, sir, whether or not as a result of the information acquired, through the information contained in this price list of McQuay-Norris to its customers, any change was made in the Moog prices offered to its distributors?"

A. I can't recall of any offer, Mr. Mayer.

By Mr. Mayer:

Q. Now, Mr. Moog, directing your attention to Respondent's Exhibits 25-A-B-C-D, could you tell me, sir, to what classes of McQuay-Norris customers those particular plans were offered?

A. It states distributors' schedule, warehouse distributor and distributor jobber on the face of the discounts.

Q. And is it your understanding then that these three schedules which appear—I am sorry, there are four schedules—which appear, went to four different types of customers within the McQuay-Norris distribution system?

A. Just which one would be a later form—this one—because there is only one distributor jobber set-up that I know of.

Q. Well, would this then, Mr. Moog, Respondent's Exhibit 25-A, be in fact the same rebate plan that was offered on the other three documents, I mean offered to the same customer?

A. No, they seem to be offered to different types of customers. This states warehouse distributor, this states (Part 3, Page 1131) distributor and this states distributor jobber. Therefore, I assume it is three different types of accounts. I don't know unless I talk with them and ask them.

Q. In determining the price of McQuay-Norris which one of those accounts, the price offer to which one of those accounts were you interested in?

A. First I would have to determine which type of accounts they have are equivalent to our type of accounts, then I could tell you which one of these was taken into consideration. These obviously are from, this is from 48, 46 and 46.

As to whether I am personally familiar with taking these various price lists and rebate plans that we have been discussing, and evaluating them and setting up Moog's price structure, I have messed with prices, but Mr. Apple, before he died, was the one who personally handled such things. Sometimes I sat in on them and sometimes I did not, but to the best of my ability, I will try to help you if I can.

Now, of your own personal knowledge, Mr. Moog, can you state if McQuay-Norris Company made one single sale during any period covered by the effective date stated on these documents to which this rebate was applied?

A. Are you asking whether I saw the check? (Part 3, Page 1132.)

Q. Whether you can state it of your own personal knowledge that the rebate was actually paid on any purchase under the plan set forth on these various documents, that is, Respondent's Exhibit 25-A through D?

A. Mr. Mayer, I have talked to a good many of their customers about it. They have told me they have received it. I have talked to McQuay-Norris people about it. They have told me they have given it. Now, how much further do I have to go, sir?

Although the first date on those McQuay-Norris documents is January 1, 1946, they have had a rebate plan for a goodly number of years. I do not know when they started the rebate system.

With reference to Respondent's Exhibit Number 23, Hastings Manufacturing Company, the blue price list on Page 65 are the prices offered by them to their distributors (Part 3, Page 1133).

The price list on there that we are concerned with is Price List Number 491-M. It is possible and probable, based on the information contained in that 491-M price list that Moog Industries made changes in the prices which it was offering to its distributors.

I did not personally handle the customer price schedule at that time. The people who made it up, if they do as they do today, would have to make changes in it. We do not make a price change every time that a competitor has a price change. Some times our prices are fixed by the Government and we cannot make a change of any kind upward but we may make one downward (Part 3, Page 1134). Government price freezing is not effective now, nor was it effective in 1949. The pertinent part of Respondent's Exhibit Number 24, which we take into consideration in the formulation of our distributor's prices, is the blue section catalog Number 1105. I do not know how long that price list was effective.

Ramco distributes its products world wide. They are a good many times larger than our piston ring sales, as Ramco handles only piston rings.

Respondent's Exhibit 24, Ramco prices, is confined only to piston ring prices, and that is true also of Respondent's Exhibit 23, Hastings Manufacturing Company's prices (Part 3, Page 1135).

As to whether there were any price changes made in the Moog pricing schedule to its distributors as a result of the Ramco prices, appearing in Respondent's Exhibit 24, there could have been. I would have to check our work sheets. As to whether there was a change made in the Moog pricing structure to distributors as a result of Ramco prices appearing on their December, 1951, price list, I am

quite sure that there was, but I cannot sit right here and tell you which one it was. When we set down all of these prices in any specific time, they must have some effect because we cannot put out a price or do anything else without taking in regard all of our competition. We do not put out a new price list every time a competitor puts out one, because its costs us a lot of money to print a price list and we have to have a good reason to do so.

Q. How can you say it must have been done when you say it is not done in some instances?

A. Because, when we find ourselves being discriminated against in the market, we find it necessary to print a new price list, that may be one reason; and at that time we accumulate all the current information we can possibly get to gain as much knowledge as we can of the competitive situation so that we remain competitive.

It is possible that if there had been no Moog price changes in December, 1951, that these new prices of Ramco are not as yet reflected in Moog prices.

With reference to Respondent's Exhibit 26-A, Ramco document, that was printed in May, 1944. I do not know the effective date it was used.

With reference to Respondent's Exhibit 26-E through H, that was printed in February, 1942, and was probably used after that date. Of course it was not in effect prior to that date.

With reference to Respondent's Exhibit 26-I through X, there is no date on there. However, I believe that these are now current and are used now (Part 3, Page 1137), and the same answer would apply to Respondent's Exhibit 26-Y through 26-Z-14.

Regarding the difference between Respondent's Exhibit 26-I through "X" and Respondent's Exhibit 26-Y through 26-Z-14, it appears that one is a jobber agreement for a new jobber just signing up with the Ramsay Corporation and the other appears to be a renewal form which they use to renew with an old jobber who has previously been under contract with them. I am not completely familiar with the Ramsay Corporation's distribution setup. I believe that Ramsay Corporation sells to warehouse distribu-

tors, or some form thereof, who, in turn, re-sell to the sub. As to what customer would sign this Ramco Jobber Agreement, I do not know. It could be the customer of the warehouse distributor and probably is (Part 3, Page 1138).

Q. Now, directing your attention in particular, Mr. Moog, to Respondent's Exhibit No. 26-J, I believe you mentioned something concerning the compensation. Would you again, if you (Part 3, Page 1138) will, sir, tell me what that part of 3 headed up "Compensation" means?

A. Well, I can only read here, Mr. Mayer, it says times turned, and refers evidently to the stock of merchandise, and then states compensation, and a figure there, from here, for three times turning the stock the compensation is $100. How they use it I am not at all certain.

Q. Does it tell us what amount of stock has to be turned?

A. Well, it states here, quotes a figure here of $1,000.

Q. And turning the $1,000 three times, and gaining compensation of $100, what percentage would that be?

A. I would say about three percent.

Q. Of merchandise turned over. Now, directing your attention, Mr. Moog, once again to Respondent's Exhibit 24, would you tell us the price list included in Respondent's Exhibit 24, according to the terms of which the man who signs the Ramco jobber agreement purchases from Ramco?

A. That I don't know, Mr. Mayer, that I don't know. I am not at all familiar with this schedule from that standpoint.

Q. I believe, Mr. Moog, in answering one of Mr. Butterfield's questions before, you mentioned something about the customers of the Ramsay warehouse. Would that be the regular direct Ramsay distributor purchasing from Ramsay?

A. How that is used, do you remember, because they may have more than one kind of warehouse, I don't know (Part 3, Page 1139).

Q. I don't recall in what connection it was said. What I was trying to determine whether the purchase in that instance would be through a warehouse distributor or

whether it was from a Ramsay warehouse, from the Ramsay Corporation.

A. I don't know. I will have to go back and read the sentence and find out.

Mr. Butterfield: I don't remember asking a question about Ramsay warehouse.

Mr. Mayer: Mr. Moog mentioned it in one of his answers.

The Witness: I don't remember how it was used. I am sorry. If you could find it in the record I would be glad to accommodate you.

Mr. Mayer: Mr. Examiner, I would like to have four or five minutes before I finish up with Mr. Moog, if I may (Part 3, Page 1140).

* * *

By Mr. Mayer:

Q. All right, sir. In attempting to determine what any individual customer pays for any particular part, take for example the McQuay-Norris line, it is necessary not only to know the price as appearing on the distributor's price list, but it is also necessary to know if that part is subject to a volume rebate, that particular customer's volume of purchases, in order to determine his net price for any item appearing on that price list subject to rebate.

Mr. Butterfield: I object to that question, Your Honor, on the ground that it calls for a conclusion of the witness and uses the word "Price"; and furthermore the question is drafted in such a way, given in such a way that it requires the witness to adopt the particular meaning which counsel is attributing to the word used in there.

Mr. Mayer: This is perfectly proper cross-examination.

Hearing Examiner Kolb: Overruled (Part 3, Page 1141).

A. McQuay-Norris' customer obviously buys on the McQuay-Norris sheet, whatever it is published. What their volume is I don't know, he must know and he must work from their volume rebate schedule. I don't know, Mr. Mayer, I don't know what the combination is, or anything else.

By Mr. Mayer:

Q. What I was trying to bring out, if you are attempting to show the net price of any individual customer, we would have to know the volume rebate which is applied to his purchases by McQuay-Norris to arrive at a net price for any single item purchased.

A. Well, the net price is printed. It says confidential net price.

Q. Well, sir, to make it more—

A. That is the blue sheet there.

Q. Perhaps more concrete and more familiar, to determine what any Moog customer pays as a net price for any single part, for instance, in the coil action line, it would be necessary to know not only the net price which is offered by Moog to its distributors but also the particular amount of retroactive rebate which was to be applied by Moog on his purchases, is that not correct, sir?

Mr. Butterfield: I object to the form of that question, if Your Honor please, because it seems to assume that all of the elements are taken in in that question as to (Part 3, Page 1142) net price, when the fact of the matter is it leaves out a great many important elements which go to net price.

Hearing Examiner Kolb: Overruled.

A. Mr. Mayer, on our price schedule we have a net cost. Any volume rebate that the customer earns based on his total volume is on an over-all picture. I have no idea how to fix any single individual part that we may produce.

By Mr. Mayer:

Q. You arrive at your over-all picture by an amalgamation of his orders of individual parts, do you not, sir?

A. There are a lot of other factors involved in there. There are certain things as freight discounts.

Q. The question was the net price.

A. This is a net price.

Q. Well, then, in determining the net price of any of your competitors, then do you ignore any volume rebates which might be applied to the net price?

A. The volume rebate is something aside from the blue sheet price which we calculate to arrive at those prices (Part 3, Page 1143).

Re-Direct Examination.

The last time that Moog issued a distributors' price list was just before the date shown there, and it became effective September 7, 1953 (Part 3, Pages 1143, 1144). That price list is Respondent's Exhibit Number 14. At the time that we issued that price list, we only took into account on this particular schedule the comparable schedules of our competitors. These are the last price lists published on the coil action and chassis parts line. January 15, 1952 is the date that this previous price list was published. We publish these price lists as often as the competitive situation calls for it. As to how often that arises, one was from January 15, 1952 to September 7, 1953, approximately a year and nine months. Before that, the only previous price change was prior to the outbreak of the Korean War, in 1950, sometime the early part of 1950, which is about two years (Part 3, Page 1144).

As to whether we made any changes in our published schedule of merchandise allowances, our rebate or discount schedule between the time of the last one and the September issue of 1953, I believe there was a change. I think our competitors also made changes in their comparative schedule of allowances, but I am not certain in which particular ones. There is a constant movement all of the time in that type of thing—a little shifting here and there—it goes on continually in this competitive field.

Hearing Examiner Kolb: Does your cost have anything to do with that?

The Witness: Cost of material has an effect, sure.

Hearing Examiner Kolb: It is not always what your competitors charge?

The Witness: No, but cost of material causes our competitors to increase and causes us to increase. We can't afford, for instance in the case of steel increase, to always add the percentage of the steel increase because perhaps our competitors did not. It is one of those situations which call for—(Part 3, Page 1145).

Hearing Examiner Kolb: Then when you raised your prices on this last sheet as compared to the previous sheet you were not meeting competitors' prices but taking care of the increased price because of the increased cost of material?

The Witness: No, we were doing both, Judge.

By Mr. Butterfield:

Q. If your competitors had not raised their prices you would still have raised your prices in accordance with the increased cost? * * *

A. No. Here is the key to whether we raise our prices or not, when it comes right down to it.

By Mr. Butterfield:

Q. That is the net price list of Ford dealers and General Motors and Chrysler?

A. That is right. When they go up we can, we are allowed—if we go up higher than they go up we hear a never-ending (Part 3, Page 1146) wail of anguish, if we don't raise as much as they do, sometimes we can't show a profit. It is one of those constant things, back and forth, trying to find a place where you can show a return on your investment and still keep your customers happy.

Q. Mr. Moog, what is your idea what the Federal Trade Commission wants you to do in this case?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: Sustained.

By Mr. Butterfield:

Q. Do you have any idea as to what the Federal Trade Commission wants you to do in respect to your pricing contracts?

Mr. Mayer: Objection. That is immaterial.

Hearing Examiner Kolb: Sustained.

By Mr. Butterfield:

Q. Mr. Moog, do you know what the issues in this case are, do you know what the case is about?

Mr. Mayer: I object to that. That is not relevant to the defense this respondent is trying to make.

Hearing Examiner Kolb: Sustained.

Mr. Butterfield: As I take it, whether the respondent knows what he is being asked to do is not relevant to any defense that he may make against a complaint issued against him by the Federal Trade Commission.

Mr. Mayer: It is no defense to the practices complained of in the complaint (Part 3, Page 1147).

September 16, 1953, at St. Louis, Missouri.

HERBERT M. RAMEL testified on behalf of Respondent as follows:

Direct Examination.

My name is Herbert M. Ramel and I am Vice-President of Moog Industries, in charge of piston rings. I have been in the piston ring business, directly and indirectly, since about 1922 (Part 3, Page 1150).

In 1922 I became indirectly connected with Ramsay, having charge of their books and making out tax returns until 1928 when I became permanently connected with them, and I was Vice-President of that company up to the first of this year. In my various executive capacities, I had occasion to study the marketing practices of the Ramco Company, and I helped formulate them for the Ramsay Company in the sale and distribution of piston rings. Other than executive duties with the Ramsay Manufacturing Company, I have been quite active publicly for a great number of years, acting somewhat as a public relations officer. I did accumulate and assume quite a number of responsibilities, both civicwise and through Government departments, and other things of that character. As to my experience in that respect, I will have to refer to the text to keep track of some of them.

I have been a member of the St. Louis Chamber of Commerce for about fifteen years, having been on their Executive Board and Chairman of a number of their committees (Part 3, Page 1151). I have been on the United States Chamber of Commerce on their Educational Committee and Labor Relations Committee. I have been on several of the committees on the Missouri State Chamber of Com-

merce, and am presently the Chairman of the Labor Relations Committee. I am past President of Associated Industries, a member of their Executive Board, and of several of their committees, and was Chairman of their self insurers' conference. I am presently on the administrative council of National Metal Products, and on their National Executive Board, and Past President of their local branch. I was formerly on the Board of Trustees of Veterans' Welfare Association, Inc. That association was abandoned this year. I am a member of the National Board of Education of Comptroller's Institute, and was on their local Board of Directors. I am a member of the Better Business Bureau Association, of Junior Achievement, Inc., and a member of their Executive Board and Board of Directors. I have just completed a four-year term on the Board of Directors of National Association of Manufacturers, and have been a member of their Industrial Committee, their Industrial Relations Committee, and their Public Relations Committee. I am a member of the Advisory Board of the Missouri Resource Development Committee; and Past Member of the Mid-West Manufacturers Association (Part 3, Page 1152).

At this point Commission's counsel interrupted the witness and conceded that Mr. Ramel had been very active in the business field.

I am familiar with Respondent's Exhibit 26-A to Z-14, (Part 3, Page 1153). In my executive capacity with Ramsay Manufacturing Company I sat in on some of the policy committees from which these contracts emanated. These contracts are developed over a period of years and during all the period I was with the company, I generally sat in on the Executive policy Committee from about 1928 up to the time of my resignation the first of this year. I am familiar with the present method by which Ramsay Manufacturing Company distributes its piston rings. Their present method is selling to warehouses. They consign to jobbers and then give jobbers a form of discount, based on turnover, paying them compensation based on the number of times they turn over. They have published price lists on the parts to which these contracts refer. There are no discounts, rebates or allowances in the present

Ramsay contract, other than I have referred to (Part 3, Page 1154). There are two of the present contracts here now. I don't know which one you are referring to.

I am familiar with the companies and their practices that are now engaged in marketing piston rings in the United States. The larger of these piston ring companies are Perfect Circle, Hastings, Ramsay, McQuay-Norris, and Seal Power. There are a number of smaller companies. The larger companies, in my estimation, produce between 85 to possibly 90% of the business, and the smaller companies produce about 5 to 8%. Some of the smaller ones, about 6 or 7, are Wausau, Superior, Pacific, Grant, White Machine Company, and Moog. There may be another one somewhere, but it is immaterial. Then there are a bunch of very small companies, more or less, one-man operation, and very insignificant as far as volume is concerned. They are too numerous to mention and some of them I don't even know (Part 3, Page 1155). About six companies manufacture the bulk of the piston rings. They are the first six that I named. Those six produce between 85 and 90% of the volume sold, and the next six produce about 5 to 8% of the volume sold. As to whether the last-named six in the distribution of the 5 to 8% are equal in distribution, I would say they are fairly comparable within maybe 1 or a fraction of a percent of each other. Of the second group that I have mentioned, probably Wausau is about the largest. As an executive of Moog Industries, I am on the Policy Committee of that company (Part 3, Page 1156).

Moog Industries meets competition in the piston ring market in the same way as they have always done, by allowing a certain declared policy of discount and rebates to the jobbing trade. Everybody receives the same contract.

Most all of the six large companies that I have named, that do 85 or 90% of the business at the present time, have either a retroactive or non-retroactive discount schedule, so I have been informed. As to what the difference is between a retroactive and non-retroactive discount schedule in its operation from a practical standpoint, there is none. You just average the thing out whether you make them retroactive or non-retroactive; it all comes out to the same

answer when you get through with it. There may be a few small piston ring manufacturers at the present time that do not operate on a rebate schedule of some kind off of their published price list, but all of the large ones do oper ate on such a rebate schedule (Part 3, Page 1157).

In order to meet the competition of these larger piston ring manufacturers, and what in my opinion it is necessary for a producer of piston rings to do to meet that competition, we just have to follow the leaders. We are helpless in the matter (Part 3, Page 1158).

As to what, in my opinion, it is necessary for us to do to successfully market piston rings in the present state of market competition, the only thing that you can do is, as I stated, to follow all the practices that are in vogue in the industry at the present time (Part 3, Page 1159).

My opinion on the necessity for following the practices that are now in vogue in the industries is that we must follow the rest of the industries or we are out of business. This testimony is confined to piston rings. At the present time Moog is in a secondary position in most jobbing establishments, and as such we must compete for that business, because we are definitely in a secondary position, and if we did not follow the same practices that have been established, we just could not do any business. The jobber would not handle them and therefore we would have no outlets for our merchandise (Part 3, Page 1161). I have made a study of the things that jobbers do in seeking sources of supply. That study has consisted of studying car distribution problems from the car owner through the car dealer, independent garage, through the jobbing distribution of both secondary and primary. By "secondary" and "primary" I mean warehousing and sub-jobbing into the manufacturing (Part 3, Page 1162).

I found that the car owner, as a rule, bought piston rings based upon the contentions and representations that were made by the independent garage man and car dealers and that they, in turn, bought from their closest and best sources of supply, which, as a rule, is what I would term the sub-jobbing distribution. Then he, in turn, generally worked through some larger source of distribution, some-

times the jobber worked directly with the manufacturer. In any case it went through some jobbing source of distribution, and all of them bought off of certain suggested price lists that had been furnished by the jobber, by the manufacturers, each receiving certain brackets of discounts based upon performance or volume, in that the result is the same, only that they have additional compensation, whether you call them discounts or whether you call them performance rebates or discounts. They virtually all mean the same thing, but each one of them is based on certain economic theories. That economic theory is a reward and incentive for effort. That is the whole basis of the Ramsay set-up, and the reason we arrive at that is it was a reward for effort and performance; and if you will read their contract, there are certain requirements that they have to do to get this type of franchise, but it is a reward that finally fits into the thing that has made this country great (Part 3, Page 1163).

Yes, I mentioned that the Ramsay method of distribution was to sell to warehouses (Part 3, Page 1164). They sell to warehouses at certain specific rebates off, the prices are certain net prices that are figured down on a percentage basis. That warehouse, in turn, re-sells to jobbers. Mopar consigns practically all—they have a ledger balance contract that sometimes is termed as consigned. It is really a ledger balance rather than an outright consignment of certain specific merchandise. They give them a ledger balance and then take back, you might say, a mortgage on the merchandise, if you want to get technical. A consignment is not a direct sale. On the consignment basis you allow him a consignment or ledger balance, and then he pays for the merchandise, he replaces it, and pays for it on open account (Part 3, Page 1165). Mopar's sub-jobber gets it direct from the warehouse, or perhaps it is shipped to him and charged to the warehouse if he is dealing through that warehouse. I think that either one of the contracts, which are part of Respondent's Exhibit 26, follow that method of distribution pretty closely. The job being contract definitely refers to ledger balance.

I am somewhat familiar with the rebate plan or the bonus plan, or the volume discount plan, in existence

to-day and being offered by Perfect Circle to its distributors. So far as piston rings are concerned, for all practical purposes there is no difference between their plan and the Moog rebate plan (Part 3, Page 1166). Perfect Circle sells piston rings exclusively. I can't say exactly whether their plan is identical to the retroactive rebate plan offered by Moog, but the results are the same. There may be a difference in the contracts and there may be a difference in percentage. When I say results are the same, I mean that there are rewards paid in both instances. I can't say the same amounts on the same amount of purchases because that differs, based on a list price from which the discounts are figured, which brings it down to a net price. In other words, you can raise your list and give larger discounts, or you can lower list and give lesser discounts, but the result is the reward.

No, the final result is not a net price so much as the amount of percentage of profit or unit of profit (Part 3, Page 1167).

As to whether Hastings and Ramsay, and McQuay-Norris and Seal Power all have plans identical with the Moog plans, in amounts and bonuses paid on amounts of purchases, I do not think I can answer that question, yes or no. The question is not a correct question (Part 3, Page 1168).

I am not too familiar with the present volume of manufacture in the Piston Ring line for the year 1952, but I would say it is somewhere between $300,000.00 and $350,000.00. Yes, I testified that I had made a study based on the various jobbing outlets and where they purchased, and exactly how various piston rings are purchased by various customers. As to whether that study is in written form, I have some substance. I would not know where to find them though. I have made some reports on it. As to whether I personally made this study, interviewing jobbers and buyers, periodically I would go out in the field, go out with salesmen and question the garage man, the independent garage man, the car dealers and the jobbers, and all the conclusions that I have drawn from my study, were based upon my personal inquiries in this field (Part 3, Page 1169).

You are correct in your statement that in my discussion relative to the various rebate plans and various bonuses offered by manufacturers, the basis for all of them was an incentive from the seller to the buyer to increase the sales of that particular seller's merchandise.

Q. Now, one thing further, Mr. Ramel. I can't quite understand the answer in which you made the statement that the retroactive and non-retroactive rebates work out the same. Was the basis for that answer that in working out the same they all come to the final ultimate goal which is the incentive from the manufacturer to the buyer; is that correct, sir?

A. I am an accountant by profession and I have worked and checked a number of these compensation systems, and as an accountant I was not interested in anything except what was the final result, and as such I always worked out to an average and whether I worked up one way or down to the other, I finally wound up with the net results, so I think the answer is "Yes" to your question (Part 3, Page 1170). * * *

Mr. Mayer: Mr. Examiner, as you know, we requested Mr. Moog to make available to us certain charts or tabulations which he has made concerning the comparison of certain Moog prices and the prices of equivalent items sold to the car dealer, and pending the receipt of that and the examination of it I would like to at that time notify the Examiner whether or not any rebuttal testimony will be taken.

Hearing Examiner Kolb: Do you understand you are to furnish some additional material, Mr. Butterfield?

Mr. Butterfield: Yes, make it available to Mr. Mayer.

Hearing Examiner Kolb: How soon will that be done?

Mr. Butterfield: You won't have a chance to look at it today, will you?

Mr. Mayer: Well, from Mr. Moog's discussion it seemed to me it would probably take him a couple of weeks. Didn't he say it was at various and sundry places?

Mr. Butterfield: They have to dig the stuff out.

Mr. Mayer: I would not want to put any unnecessary burden on the Moog Company.

Hearing Examiner Kolb: Is there any materiality to them?

Mr. Mayer: I believe there might be, sir.

Hearing Examiner Kolb: Well, say you could furnish that in ten days, Mr. Butterfield? (Part 3, Page 1171.)

Mr. Butterfield: I have one case which I have to finish up. I would like to concentrate on that and finish that up, and in the next ten days I will be pretty busy.

Hearing Examiner Kolb: It is just a matter of Mr. Moog gathering that stuff together and sending it to Mr. Mayer and he will decide whether he wants to hold any further hearings or not.

Mr. Butterfield: Well, I will ask Mr. Moog to get that stuff together and get it to Mr. Mayer as soon as possible.

Hearing Examiner Kolb: I do not think it will be necessary to photostat it at this time. It may be sent to Mr. Mayer or you can send it to me and I will turn it over to Mr. Mayer. I think you had better send it direct to Mr. Mayer and if he decides it will be photostated, and if not, he will return it, and the case is closed, as I understand it. Say that material will be made available to Mr. Mayer within ten days, or by September 28, Monday, September 28. And how long will it take you to advise me whether or not you wish to hold any rebuttal testimony?

Mr. Mayer: I would like to have a ten-day period after that, if the Examiner please. I would not want to be limited as to the consideration to taking rebuttal solely to that material which is being returned.

Hearing Examiner Kolb: You can determine in the next ten days if there is anything else (Part 3, Page 1172).

Mr. Mayer: I will have to make some type of comparison of several of the exhibits to find that out, sir.

Hearing Examiner Kolb: Well, say we set October 5 as the date as to when you will advise whether or not additional testimony is to be taken in rebuttal.

Mr. Mayer: All right.

Hearing Examiner Kolb: And if no rebuttal testimony is to be taken I will then set the date for proposed findings by formal order, probably thirty days (Part 3, Page 1173).

[fol. 507] IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,370

Moog Industries, Inc., Petitioner,

v.

Federal Trade Commission, Respondent.

Petition to Review Order of Federal Trade Commission.

Malcolm I. Frank (Bernard Mellitz, James W. Cassedy and Mellitz & Frank were with him on the brief), for Petitioner.

James E. Corkey, Attorney, Federal Trade Commission (Earl W. Kintner, General Counsel, and Robert B. Dawkins, Assistant General Counsel, and Janet D. Saxon, Attorney, for Federal Trade Commission, were with him on the brief), for Respondent.

OPINION—November 5, 1956

Before Sanborn, Johnsen and Whittaker, Circuit Judges.

Whittaker, Circuit Judge.

The Federal Trade Commission, after hearings, found that petitioner, which manufactures and sells automobile repair or replacement parts in interstate commerce, has [fol. 508] granted to its customers, at the end of each annual period, a retroactive volume rebate consisting of a flat, graded, percentage of the aggregate dollar volume of their respective purchases in the preceding year, and that this practice has discriminated in price between different purchasers of like grades and qualities of its products, and that the effect "may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations", and it concluded that such discriminations violated Section

2(a) of the Clayton Act, 38 Stat. 730, as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C., Section 13, which, in pertinent part, provides:

> "(a) It shall be unlawful for any person engaged in commerce * * *, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * *, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; *Provided,* That nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *."

The Commission accordingly issued an order prohibiting petitioner from discriminating in price:

> "By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying a higher price in the resale and distribution of (respondent's) petitioner's products."

[fol. 509] Aggrieved by that order, petitioner has brought the matter here upon its petition for review, and seeks reversal upon the grounds (1) that the Commission's findings and conclusions are erroneous, and are not supported by any substantial evidence, (2) that the Commission's order is broader than its powers to make, and (3) of claimed procedural errors of the Commission.

It is conceded by the parties that (a) petitioner sold and distributed its products in interstate commerce, (b) they were sold for resale within the United States, (c) petitioner's *base price* for its products has been the same to all its customers, (d) petitioner promulgated, years ago, and has since universally used, the questioned annual

retroactive volume rebate plan, and (e) the plan allows a volume discount, or rebate, to petitioner's customers, computed, at the end of each annual period of purchases, upon a flat, graded, percentage of the aggregate dollar volume of their respective purchases made in the preceding year. Petitioner practically concedes, at least does not seriously dispute, as, indeed, it could not, that its rebate plan has resulted in higher prices to some than to others of its customers—the extent of the differentials depending upon the aggregate dollar volume of their respective purchases in the preceding year.

The essential facts found by the Commission are that petitioner manufactures at St. Louis, and sells to jobbers, whom it calls distributors, and to "group buying" associations throughout the country, thousands of different types and sizes of replacement parts—all of the same high or first grade and quality—for many makes, models and ages of automobiles and trucks. These jobbers and "group" buyers are not granted exclusive territories by petitioner, and two or more of them do business in each trade area, and, in turn, sell these products to the same [fol. 510] types of customers—repair shops, garages, service stations, fleet accounts, car dealers, other jobbers, and over-the-counter—as competitors. For pricing and volume rebate purposes, petitioner has classified its products into three lines, namely (1) leaf spring line, including coil springs and chassis parts, (2) coil action line, and (3) piston ring line. It enters into contracts, which it calls franchise agreements, with its jobber and "group buying" purchasers. Those contracts contain an annual cumulative rebate schedule, for each of the three lines of products, as set forth in the margin.[1] It will be seen from those

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[1] These rebate schedules were applicable to the sample year 1949.

Coil Action Line

Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)	Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)
Under $1,000	None	$15,000 to $17,499	14
$1,000 to $4,999	5	$17,500 to $19,999	15
$5,000 to $7 499	7½	$20,000 to $22,499	16
$7,500 to $9,999	9	$22,500 to $24,999	17
$10,000 to $12,499	10	$25,000 to $27,499	18
$12,500 to $14,999	12	$27,500 and over	19

(Continued)

[fol. 511] schedules that a different volume rebate is applicable to each line; that the coil action line rebate ranged from 5% on annual net purchases of $1,000, to 19% on annual net purchases of $27,500 or more; that the piston ring line rebate ranged from 2% on annual net purchases of $2,000, to 20% on annual net purchases of $30,000 or more, and the leaf spring line rebate ranged from 3% on annual net purchases of $2,000, to 13% on annual net purchases of $35,000 or more.

In addition to those rebates, petitioner allowed a 10% warehousing commission to those of its customers who resold its products to other jobbers whom it had approved, provided the combined earnings from the volume rebate and the redistributing commission could not exceed the maximum volume rebate for that line. Petitioner also allowed its customers a cash discount of 2% if payment be made by the 10th day of the month following order.

Piston Ring Line

Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)	Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)
Under $2,000	None	$9,000 to $9,999	13
$2,000 to $2,999	2	$10,000 to $11,999	14
$3,000 to $3,999	5	$12,000 to $14,999	15
$4,000 to $4,999	7	$15,000 to $17,999	16
$5,000 to $5,999	9	$18,000 to $20,999	17
$6,000 to $6,999	10	$21,000 to $24,999	18
$7,000 to $7,999	11	$25,000 to $29,999	19
$8,000 to $8,999	12	$30,000 and over	20

Beginning July 1, 1949, petitioner introduced the following schedule applicable to its leaf spring line.

Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)	Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)
Under $2,000	None	$8,000 to $9,999	8
$2,000 to $2,999	3	$10,000 to $14,999	9
$3,000 to $3,999	4	$15,000 to $19,999	10
$4,000 to $4,999	5	$20,000 to $27,499	11
$5,000 to $5,999	6	$27,500 to $34,999	12
$6,000 to $7,999	7	$35,000 and over	13

In the sample year 1949, petitioner had franchise agreements with 15 group buying organizations or associations having numerous members, many of whom operated in the same trading area. The group buying was done substantially as follows: A member of a group would forward his orders directly to petitioner, with a copy to the group's office, or through the group's office. Petitioner would then ship the goods directly to the member, but would bill the group's office which would pay the bills and the member would later reimburse the group's office. At the end of each year, petitioner totaled the combined purchases by all members of the group and paid a rebate, in the scheduled percentage applicable to the total of those combined purchases, to the group's office, which, in turn, distributed the rebate to its members on the basis of the amount of their respective purchases.

[fol. 512] The Commission found that these group buying associations were "in reality bookkeeping devices for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members", and that such jobber members "in fact, purchased their requirements of petitioner's products directly from petitioner, and at the same time received a more favorable price or higher rebate based upon the combined purchases of all the members." This finding is not here challenged by petitioner.

Though the fact that petitioner's rebate plan has resulted in price differentials between its customers is not here, and, we think, could not be, in serious dispute, two simple illustrations—typical of many shown by the evidence—will demonstrate how, and to what extent, it has done so, and may aid general understanding of points to follow.

First, the Commission found that in 1949 petitioner had approximately 1,200 purchasers of its coil action line, but 793, or nearly two thirds of them, received no rebate and only 407, or about one third of them, received a rebate, and 352 of those 407 received a rebate of only 5%, while others, in smaller numbers, received rebates ranging from

7½% to 19%, as illustrated by the tabulation in the margin.[2]

[fol. 513] Second, the evidence shows, and the Commission found that petitioner sold its leaf spring line to six customers in Dallas, all of whom were in competition with each other in the resale of those products, four of whom purchased through group buying organizations and received rebates from petitioner ranging from 12% to 15%, but the fifth, who was not a member of a "group", received no rebate, because his aggregate annual purchases were not sufficient, and the sixth, who was the largest purchaser of the six, but not a member of a group, received a rebate of 7.29%, of the dollar amount of its purchases in the preceding year.

That these rebates were substantial is shown by the Commission's finding that they amounted, on the coil action line, to $163,392.66 in 1947, to $203,478.53 in 1948, and to $106,255.91 in 1949, and, on the piston ring line, they amounted to $57,561.89 in 1947, to $21,011.19 in 1948, and to $22,380.88 in 1949, and on the leaf spring line, they amounted to in excess of $81,000 in 1950.

These illustrations demonstrate that petitioner's cumulative annual rebate plan has resulted in general, widespread and substantial price differentials between its customers.

We have no issue here respecting justification of these price differentials, as petitioner does not contend on this review that it has justified the different prices by any showing of "differences in the cost of manufacture, sale

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[2]

Net Purchases	Rebate	Number of Customers	Average Annual Purchases
Under $1,000	None	793	
$ 1,000 to 4,999	5%	352	$ 1,911
5,000 to 7,499	7½%	27	5,499
7,500 to 9,999	9%	4	8,372
10,000 to 12,499	10%	6	10,660
12,500 to 14,999	12%	4	13,667
15,000 to 17,499	14%	5	9,277
17,500 to 19,999	15%	2	18,735
20,000 to 22,499	16%	0	.....
22,500 to 24,999	17%	1	23,444
25,000 to 27,499	18%	1	26,887
27,500 and over	19%	5	33,471

or delivery", as indeed it could not, because their source is its rebate system, based, not on the quantities or other factors involved in any particular sale, but, rather, upon the combined dollar amount of all sales to a purchaser, or to a "group" of which he is a member, made in the preceding year (without any prior commitment to pur-
[fol. 514] chase any particular amount), and that system results "inevitably in systematic price discriminations, since the prices * * * bear relation to factors other than actual costs of production or delivery." *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 732. Cf. *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37.

Petitioner says that its rebates are equally available to all. "Theoretically these discounts are equally available to all, but functionally they are not", because they embrace the "evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 42.

It has been many times held by the Supreme Court that price differentials, not justified by a showing of differences in the cost of manufacture, sale or delivery, become price discriminations and are prohibited by the Robinson-Patman Act if they may substantially lessen, injure, destroy or prevent competition, *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 44, *Federal Trade Commission* v. *Staley Co.,* 324 U.S. 746, 751, *Corn Products Refining Co.,* v. *Federal Trade Commission,* 324 U.S. 726.

Petitioner's contentions, on the subject of injury to competition, get down to this: That the Commission failed to adduce any evidence that the price discriminations injured its competing purchasers, because it did not show that competing purchasers bought exactly the same, or interchangeable, items at different net prices; and that the Commission merely inferred competitive injury, and that there was no room for such an inference because such would be contrary to the positive testimony of a number of its purchasers, categorically denying that they were injured, and also to the stipulation that all others would so testify if called.

[fol. 515] It is true that the evidence did not identify,

item by item, the exact parts in any line sold by petitioner to particular purchasers, but only dealt with them by the same lines as they were sold by petitioner. Thus, for example, the evidence does not specifically show whether leaf springs, coil action parts or piston rings sold to a particular purchaser were designed for the same make, model and age automobile as the like products sold to his competitor. On this basis, petitioner argues there is no evidence that it sold the same items to competing purchasers at different net prices. And it argues that although its products "may all be of one grade and quality" the Commission must prove that it sold "interchangeable" items to competing purchasers at different net prices, otherwise they will not "compete", and could not properly be regarded as of "like grade and quality" within the meaning of the act.

Nothing in the statute suggests this, in a case like the present, and petitioner points to no reason or authority that supports it. The cited case of *Package Closure Corp.* v. *Seal Right Co.*, 2 Cir., 141 F. 2d 972, does not involve the point, and the other cited case, from this circuit, of *Boss Manufacturing Co.* v. *Payne Glove Co.*, 71 F. 2d 768, compared second grade cloth gloves of inferior materials and workmanship with first grade ones of superior materials and workmanship, and, naturally, held them to be of different grade and quality.

We agree with the statement set out at page 157 of the "Report of the Attorney General's National Committee to Study the Anti-Trust Laws", issued March 31, 1955, that "The 'like grade and quality' concept * * * was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute", and while [fol. 516] leaf springs, coil springs or piston rings may not be interchangeable and usable in all makes, models and ages of automobiles, we believe that when such items are sold to competitors in lines, as petitioner has sold them, and when, as here, a discriminatory rebate is paid upon all items in a line, the Commission may properly find that such items are "sufficiently comparable for price regulation by the statute."

The real and substantive answer is that, while leaf springs, coil action parts or piston rings for a Ford sedan of 1947 may be sufficiently different from those for a Chevrolet coach of 1950 that the former could lawfully be sold for *uniform* higher or lower prices than the latter, the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not.

While all purchasers did not handle all three of petitioner's complete lines, some of them did, and numerous ones handled two of the lines; and it was shown and found that two or more of petitioner's purchasers did business in each trade area and were, consequently, competitors therein. Through operation of the applicable cumulative annual rebate schedule, some were charged higher prices than others. This constitutes an adequate evidentiary basis to support the Commission's finding that the price discriminations may substantially injure competition.

[fol. 517] Petitioner sought to offer detailed evidence, on an item by item basis, to show that the leaf springs, coil action parts and piston rings bought by particular purchasers, doing business in the same trade area, were not uniformly for the same make, model and age of automobile, and not exactly alike and interchangeable. Objection was made and sustained on the ground of immateriality, since the parts, though in part for different makes, models and ages of automobiles, were catalogued, priced and sold, and were subject to rebate, as lines. Petitioner complains that this was prejudicial error. We believe that it was not, for all the reasons above stated.

Petitioner put on a number of its customers as witnesses, and asked them whether they had been competitively injured by its cumulative annual rebate plan, and each said that he had not been injured, and it was later

stipulated by the parties that all of petitioner's other customers would so testify, if called.

Petitioner argues, in connection with its contention that the Commission's findings were based only on nonpermissible inferences, that this uncontradicted testimony by "hardheaded practical businessmen" shows the complete absence of competitive injury to petitioner's customers by its discriminatory prices.

The answers are, first, that the Commission's findings were not based upon nonpermissible inferences, but upon proven facts and inferences properly to be drawn therefrom, and, second, a number of these witnesses were large buyers or members of groups, and thus received high rebates and were benefitted by the plan, and, third, their answers were conclusions contrary to simple mathematics, which may be illustrated by the example of two competing purchasers in a given trade area, buying petitioner's coil [fol. 518] action line. Through one or more orders in a given year, one buys $4,999 worth of those products, and the other buys $27,500 worth (or even $4,999 worth, if through a "group" whose combined purchases in the year aggregate $27,500 or more). At the end of the year, petitioner will pay the former a rebate of 5% of the aggregate dollar amount of his purchases of $4,999, but will pay the latter a rebate of 19% of the aggregate dollar amount of his (or of his "group's") purchases of $27,500 (which, in either case, of course, includes the first $4,999 of his purchases) and, thus, on the first $4,999 of the purchases, the former gets a rebate of $249.81, while the latter gets a rebate of $949.81. A witness cannot be allowed by conclusion to deny a mathematical fact, and all the testimony of these jobbers, on this score, amounts to—if they understood the facts—is that they are not objecting.

The Commission was not required to show that petitioner's rebate system has, in fact, adversely affected competition. The language—in the "effect" clause of the statute—is "*may be* substantially to lessen competition * * *." (Italics supplied). The Supreme Court has repeatedly held that Section 2(a) of the Act does not require a finding that the discriminations in price *have in fact* had an adverse effect on competition. *Corn Products Refining*

Co. v. *Federal Trade Commission*, 324 U.S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356, 357. It has also held that "The statute is designed to reach such discriminations 'in their incipience' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products* case, 324 U.S. at 738.

The proper test of injury to competition has been phrased in various ways. In the *Corn Products* case, at [fol. 519] page 738, the Court stated, following the *Standard Fashion* case, "The use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." Later, in the *Corn Products* case, at page 742, the Court declared, "As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable *possibility* that they 'may' have such an effect." (Italics supplied.) The latter passage was repeated in the *Morton Salt* case, at page 46, although with the qualification that it "is to be read also in the light of" the statement on page 738 of the *Corn Products* case (334 U.S. at 46n.).

Many of petitioner's customers testified that their business is keenly competitive and consists of the sale of thousands of items at small margins of profit, and that it is necessary to acquire goods at the lowest available price to be competitive, and those who received these rebates testified that these rebates were very important to them, and some testified that the rebates were more important than the 2% cash discount allowed by petitioner, of which all of petitioner's customers consistently took advantage. One, who ranked third or fourth in size in the city of Dallas, testified that his over-all net profit ran less than 4%.

With competition so keen, margins so small and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition.

While many of petitioner's customers handled numerous lines, and were not dependent for financial success upon [fol. 520] profits from petitioner's lines alone, yet the Commission, in determining the reasonable probability of injury to competition, was entitled to take account of the effect of rebates from petitioner's products upon their businesses, for the Supreme Court points out in the *Morton Salt* case, at page 49:

> "There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery stock consists of many comparatively small articles, there is no possible way to effectively protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

For all of the foregoing reasons, we hold that the Commission's finding that petitioner has discriminated in price between different purchasers of like grades and qualities of products and that the effect may be substantially to lessen, injure, destroy or prevent competition, was supported by substantial evidence.

Petitioner's next contention is that the Commission's order was too broad, in that it prohibits all price differences and, hence, prohibits conduct which is not unlawful, and, in consequence, denies petitioner the right to participate in lawful competition; and in that it is not, but should be, limited to the secondary level of competition, and in that it should not have included the phrase "piston rings and other related items."

This order is substantially the same as the one approved by the Supreme Court in *Federal Trade Commission* v. [fol. 521] *Ruberoid Co.*, 343 U.S. 470. It was argued in that case that the failure to include in the order provisos excepting from its prohibitions those differentials which merely make allowances for differences in cost of manu-

facture, sale and delivery, or which are made in good faith to meet an equally low price of a competitor, amounted, in effect, to a prohibition against lawful competitive conduct. But the Supreme Court rejected this contention, saying:

> "* * * we think the provisos are necessarily implicit in every order under the authority of the Act, just as if the order set them out *in extenso*. Although previous Commission orders have included these provisos, they gained no force by that inclusion. Their absence cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discriminations in accordance with the statutory provisos."

Thus, the provisos which petitioner would insert are implicitly contained in the order as it stands.

The contention that the order should be limited to the secondary level of competition, overlooks the fact that the order is so limited. By its terms, the order covers only sales to those who, in fact, compete "in the resale and distribution of respondent's products." This language limits the order to the secondary line of competition.

As to petitioner's contention that the order should not have contained the phrase "piston rings and other related items", there was evidence that piston rings were sold to the same type of accounts as petitioner's other lines, and that cumulative annual rebates were paid to their purchasers in accordance with the schedule applicable to those products, and that, under the applicable schedule, rebates were paid to some, but not to other, purchasers of those products, but it is true that the Commission did not [fol. 522] segregate piston ring sales and develop the evidence respecting them with the same completeness as in the coil action and leaf spring lines. But the Commission's power is not limited to prohibiting the identical practices which have resulted in illegal price discriminations. It has the authority to prohibit acts of the same type or class as those committed in the past. This was made clear in the *Ruberoid* case by the statement, at page 473, reading:

> "In carrying out this function the Commission is not limited to prohibiting the illegal practice in the

precise form in which it is found to have existed in the past. If the Commission is to attain the objective Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has travelled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."

We cannot say that inclusion of the questioned phrase was beyond the Commission's power in these circumstances.

Petitioner's final contentions are that the Commission erred in overruling its motion for a bill of particulars, filed in the pleading stage and renewed at the close of the Commission's evidence, and that the Commission erred in overruling petitioner's motion, made at the conclusion of the Commission's case, for an order requiring the Commission to elect, from the mass of evidence adduced, typical transactions, and areas involved, upon which it would rely, and that the action of the Commission in overruling these motions constitutes a denial of due process, within the meaning of the Fifth Amendment.

The answer is that, while the complaint was in the general terms of the statute, it was made apparent on the first day of the hearing that the Commission was relying [fol. 523] upon the price discriminatory effect of petitioner's cumulative annual rebate plan as the sole source of the price discriminations found, and petitioner admitted, and still admits, the existence of that rebate plan, and, therefore, and in these circumstances, the denial of petitioner's motions for a bill of particulars was not prejudicial and cannot be said to have constituted a denial of due process. The foregoing is equally applicable to, and conclusive upon, petitioner's contention respecting the overruling of its motion to elect.

There being no prejudicial error, the order of the Commission must be, and it is hereby, affirmed.

Affirmed.

[fol. 527] Motion for rehearing covering 8 pages filed November 19, 1956 omitted from this print.

It was denied, and nothing more by order November 29, 1956.

[fol. 529] [File endorsement omitted]

[fol. 532] IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

PETITIONER'S MOTION TO HOLD JUDGMENT AND ORDER IN ABEYANCE--Filed November 19, 1956

In the event that the Court should see fit to overrule petitioner's Motion for Rehearing filed concurrently herewith, then Moog Industries, Inc., petitioner herein, moves and requests the Court to set aside the opinion and judgment herein for the time being and hold the same in abeyance until the entire automotive replacement parts industry [fol. 533] can be subjected to similar judgments and orders, and for grounds therefor, respectfully states:

1. That the entry of judgment at this time would subject petitioner to price discrimination and unfair competition and cause certain financial loss as well as loss of customers by permitting the competitors of petitioner to continue to use quantity discount pricing systems.

2. That the entry of judgment at this time is unjust to petitioner until all of petitioner's competitors using similar quantity discount pricing systems are subjected to similar judgments, as the quantity discount pricing system is part and parcel of the whole automotive replacement parts industry.

3. That the entry of judgment at this time denies petitioner the equal protection of the laws and defeats the very purpose of the enactment of the Robinson-Patman Amendment to the Clayton Act which is to protect the small competitor from the large competitor.

Wherefore, petitioner prays that this motion be granted.

Respectfully submitted,

Bernard Mellitz, Malcolm I. Frank, 418 Olive Street, St. Louis 2, Missouri.
James W. Cassedy, 1001 Fifteenth Street, N. W., Washington 5, D. C.
Attorneys for Petitioner.

Mellitz & Frank, Of Counsel.

[fol. 534] CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner herein, certify that the foregoing motion to hold judgment and order in abeyance is filed in good faith and is believed by counsel to be meritorious.

Bernard Mellitz,

Malcolm I. Frank,

James W. Cassedy.

[fol. 535] IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER DENYING MOTIONS OF PETITIONER FOR REHEARING AND TO HOLD IN ABEYANCE ENTRY OF JUDGMENT—November 29, 1956

Motion of petitioner for a rehearing of this cause has been considered by this Court, and, It is now here Ordered that said motion be, and hereby is, denied.

Motion of petitioner, filed concurrently with motion for a rehearing, to hold in abeyance entry of judgment in this cause has also been considered by the Court, and, It is now here Ordered that the said motion be, and hereby is, denied.

[fol. 537] IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15370—September Term, 1956.

MOOG INDUSTRIES, INC., Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent.

FINAL DECREE AFFIRMING ORDER TO CEASE AND DESIST—November 29, 1956

Moog Industries, Inc., a corporation, petitioner herein, having filed in the Court on June 27, 1955, its petition to review and set aside an order to cease and desist issued on April 29, 1955, by the Federal Trade Commission, respondent herein, in a proceeding before said Commission entitled "In the Matter of Moog Industries, Inc., F. T. C. Docket No. 5723"; and the cause having been heard by the Court on briefs and oral argument; and the Court having rendered its decision on November 5, 1956, and having denied said petition to review:

Now, therefore, It is Hereby Ordered, Adjudged and Decreed that the aforesaid petition to review be, and the same is hereby dismissed, and that the said order to cease and desist be, and it hereby is, affirmed:

And It is Hereby Further Ordered, Adjudged and Decreed that within sixty days from date of issuance of certified copy of this decree to the Federal Trade Commission the petitioner file with the Federal Trade Commission a [fol. 539] report in writing setting forth in detail the manner and form in which it has complied with said order to cease and desist.

[fol. 541] IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF CERTIFIED COPY OF DECREE, ETC.—December 17, 1956

Upon consideration of motion of counsel for petitioner for an order withholding transmittal of the decree to the Federal Trade Commission and to stay enforcement thereof, pending application to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that said motion be granted and that issuance of certified copy of the decree in this case be, and the same is withheld for transmittal to the Federal Trade Commission for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 543] IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER FURTHER STAYING ISSUANCE OF CERTIFIED COPY OF DECREE, ETC.—January 14, 1957

Motion has been filed by petitioner for further extension of twenty days from January 16, 1957, in which to apply to the Supreme Court of the United States for a writ of certiorari, and counsel for respondent consenting, It is Ordered by the Court that said extension of time be, and is hereby, allowed, and if within that time there is filed with the Clerk of this Court a certificate of said Supreme Court that a petition for writ of certiorari and record have been filed, the stay of issuance and transmittal of a

certified copy of the decree of this Court to the respondent Federal Trade Commission shall continue until the final disposition of the case by the Supreme Court.

[fol. 545] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 547] Supreme Court of the United States

[Title omitted]

Order Allowing Certiorari—Filed March 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted limited to question 4 presented by the petition for the writ which reads as follows:

> "4. Another question presented is that of the denial by the Court of Appeals of petitioner's Motion to Hold Its Judgment and Order in Abeyance or to exercise its equitable powers and original jurisdiction, until its various numerous competitors who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders, since only two of its many competitors have been proceeded against similarly by the Federal Trade Commission; whether such denial by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and consequent financial loss; and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of petitioner."

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accom-

panied the petition shall be treated as though filed in response to such writ.

Mr. Justice Whittaker took no part in the consideration or decision of this application.

[fol. 549] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EXHIBITS—Filed August 31, 1956

[fol. 550] RESPONDENT'S EXHIBIT 10-B

TELEPHONE
HUMBOLDT 5 4398-4399

CABLE ADDRESS
"REGAL"

REGAL TOOL & MFG. CO., INC.
MANUFACTURERS
AUTOMOTIVE REPLACEMENT PARTS.
35-39 CENTRAL AVENUE
EAST NEWARK, NEW JERSEY

SCHEDULE OF DISCOUNTS ON REGAL COIL SUSPENSION PARTS

SCHEDULE D

All Schedule D Jobbers will be invoiced at regular distributor net prices as shown on current pink sheet. Any jobber maintaining a $500.00 stock of Regal Coil Action Parts, will be granted a 5% discount on all invoices submitted, subject to payment on 10th, prox., — less 2%.

SCHEDULE C

Any jobber who will contract to purchase and maintain a 1000 unit stock with a yearly expectancy of from $8 to $10,000.00 volume will be granted a 10% discount from each invoice, plus the usual 2%, 10th-prox. If the state-

ment is not paid promptly by the 10th of the month following date of purchase the above discounts do not apply. And it is also understood by the purchaser that his monthly purchases are to be maintained at a volume rate that will amount to a minimum average of $2,000.00 or more quarterly, any excess volume in any one quarter will be accumulative and can be applied to the following quarter to bring it up to the average minimum quarterly average of $2,000.00. If the purchaser fails to reach this minimum volume in any one quarter, this agreement of the extra 10% discount from the invoice will become void, and purchaser will revert ba k to a lower discount bracket.

SCHEDULE B

Any distributor who will contract to stock and maintain a 2000 unit stock, with an expectancy of from $18 to $20,000.00 yearly volume, will be granted a 15% discount from each invoice, and the usual 2% 10th-prox. These discounts not allowed if statement is not paid promptly by 10th of the month following date of purchase. It is also to be understood by the purchaser that his monthly purchases are to be maintained at a volume rate that will amount to an average minimum quarterly volume of $4,500.00 or more. Any excess volume in any one quarter will be accumulative and can be applied to the following quarter to bring it up to the minimum quarterly average of $4,500.00. If the purchaser fails to reach the minimum volume in any one quarter this agreement of the extra 15% discount from the invoice will become void, and purchaser will revert back to a lower discount bracket.

An extra 5% retroactive discount will be granted if yearly purchases exceed $25,000.00.

[fol. 551] RESPONDENT'S EXHIBIT 10-C

TELEPHONE
HUMBOLDT 5-4398-4399

CABLE ADDRESS
"REGAL"

REGAL TOOL & MFG. CO., INC.
MANUFACTURERS
AUTOMOTIVE REPLACEMENT PARTS
35-39 CENTRAL AVENUE
EAST NEWARK, NEW JERSEY

SCHEDULE A

Any distributor or warehousing group, operating as a warehouse and performing the functions of a warehouse by soliciting business and selling jobbers, whose yearly purchases will exceed $25,000.00 will be granted a 20% discount from each invoice, to compensate for their warehouse service. These subject to 2%-10th prox., unless otherwise contracted. All delinquent accounts are subject to loss of any previously allowed discounts.

OBSOLESCENCE POLICY

Any item declared obsolete may be returned to Regal Tool & Mfg. Co. Inc. by the original purchaser, for full credit at the original (accounts) purchase price. Freight to be prepaid to Regal Tool & Mfg. Co., Inc. by account returning any obsolete merchandise.

Respondent's Exhibit 16.

[fol. 552]

Thompson Products, Inc.

Full Line Franchise—1949

In order to qualify as a FULL LINE DISTRIBUTOR of THOMPSON PRODUCTS, INC. merchandise for the period commencing January 1, 1949 and continuing through December 31, 1949 and to establish the rights and obligations of the parties hereto, the DISTRIBUTOR and THOMPSON PRODUCTS, INC. hereinafter called THOMPSON enter into the following agreement.

FULL LINE DISTRIBUTOR ACCOUNT

THOMPSON will sell and the DISTRIBUTOR will purchase THOMPSON merchandise listed in the Thompson Catalog during the period of this franchise.

LOWEST PRICES

The DISTRIBUTOR's orders will be placed at the prices set forth in Thompson Products Distributor's Confidential Net Price List in effect at the time of shipment.

TERMS:

The DISTRIBUTOR will be extended credit terms of 2% 10th Prox. and net 30 days. No printed or other matter on any Distributor's purchase order which is either an extension of or in contradiction to any of the terms and provisions of this franchise shall have any force or effect.

All orders shall be subject to acceptance by the Thompson Products, Inc. at its home office at Cleveland, Ohio.

FREIGHT ALLOWANCE

Shipment of all lines covered by this franchise exceeding 100 lbs. net weight made from the factory will be F. O. B. factory. Full freight prepaid. Thompson reserves the right to choose the method and route of transportation employed. Parcel post and express shipments and freight shipments less than 100 lbs. F. O. B. factory transportation collect.

All branch shipments will be made F. O. B. the branch point transportation collect.

WAREHOUSE SERVICE

THOMPSON will maintain branch service, unless conditions require otherwise, in Atlanta, Ga., Boston, Mass., Chicago, Ill., Cincinnati, Ohio, Cleveland, Ohio, Dallas, Texas, Denver, Colo., Detroit, Mich., Indianapolis, Ind., Jacksonville, Fla., Kansas City, Mo., Los Angeles, Calif., Memphis, Tenn., Minneapolis, Minn., New York, N. Y., Oklahoma City, Okla., Omaha, Nebr., Philadelphia, Pa., Pittsburgh, Pa., Portland, Ore., Richmond, Va., St. Louis, Mo., San Francisco, Calif., Seattle, Wash., Toronto, Ont., and Wichita, Kans.

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Respondent's Exhibit 16.

[fol. 553]

ADVERTISING AND MERCHANDISING ASSISTANCE

THOMPSON will furnish the DISTRIBUTOR with a supply of catalogs, display material, mailing matter and other merchandising assistance to help the DISTRIBUTOR promote the sale of THOMPSON merchandise

THOMPSON JOBBER SALES

With the consent of THOMPSON, DISTRIBUTOR may designate Jobbers as THOMPSON Jobbers for the period of this Franchise No Jobber shall be entitled to be a THOMPSON Jobber until such Jobber has signed a THOMPSON Jobber's Franchise and such Franchise has been accepted in writing by THOMPSON To qualify as a THOMPSON Jobber, a Jobber must carry at all times an adequate stock of all manufactures of THOMPSON merchandise under THOMPSON S numbers averaging not less than $1[illegible] in value of inventory Either party hereto with or without cause may cancel this agreement by giving the other party 30 days written notice

The DISTRIBUTOR will receive a credit in the amount of 10% of his cost of merchandise in not to exceed 5% of his net purchases from THOMPSON during the period of this Franchise if said merchandise is sold by the DISTRIBUTOR to a THOMPSON Jobber at THOMPSON S Local Distributor net prices less 10%, or at a lower price, and if such sales are reported MONTHLY on the special monthly report forms provided for this purpose by THOMPSON, and the reports are received by THOMPSON within 30 days from the last day of the month in which the sales were made by the DISTRIBUTOR To eliminate the need for the DISTRIBUTOR to attach invoice copies to his report forms, THOMPSON reserves the right to make periodic inspection of the invoices issued by the DISTRIBUTOR to THOMPSON Jobbers

The DISTRIBUTOR agrees to supply the requirements of his authorized THOMPSON Jobbers from his stock excepting the original stock order which must be shipped from Cleveland including catalogs, price lists and advertising material

Sales to persons, firms or corporations owned in whole or in part by or managed by the DISTRIBUTOR are not Jobber Sales within the meaning of this Franchise

OBSOLESCENCE

The sales representatives of THOMPSON will be supplied with Warning Lists showing parts which THOMPSON S inventory records show are becoming slow moving After the representative has advised the DISTRIBUTOR of the items set forth on said list, the DISTRIBUTOR will have the privilege of returning such items for full credit or retaining them in stock until they appear on the Obsolescence List hereinafter described

At regular intervals the DISTRIBUTOR will receive an Obsolescence List showing parts that are being declared obsolete and will be allowed a period of four weeks to return any of these parts in his stock for full credit After the time allowed for such return has expired, these parts will not be accepted for return under any condition

In each instance freight must be prepaid by the DISTRIBUTOR

EXCHANGE POLICY

If the DISTRIBUTOR wishes to exchange merchandise, he must write the main office of THOMPSON, giving his reasons for wanting to make the exchange, accompanying the letter with a list of the parts he wishes to return Should such return be approved by THOMPSON it will be sent to a representative who will help the DISTRIBUTOR make up an order of equal size to offset the return and give the DISTRIBUTOR an official "Return Goods Tag" for making the return This tag must be used in making the return shipment Freight must be prepaid to Cleveland, Ohio and the DISTRIBUTOR S account will be credited at the current price less 10% for handling All inventory adjustments must be made prior to November first, 1949

[Tol. 554].

Respondent's Exhibit 16.

LINES

[illegible] THOMPSON [illegible] the franchise consist of the following:

[illegible]	[illegible]	[illegible] Gear Pumps & Parts
[illegible] Iron Pins	[illegible] Valve Springs	Spring Washers
[illegible] Iron Pin Bushings	[illegible] Valve Stems	Hydraulic Products
[illegible] Connecting Rods	[illegible] Valve Seat Inserts	Tie Rod Ends
[illegible] Crankshaft Gears	[illegible] Valve Guides	Arma Ball Joints
[illegible] Camshaft Gears	Bushings	[illegible] Rod Ends & Bearings
[illegible] Bushings	Independent Front Suspension Parts	Tie Rod Ends

PURCHASE BONUS

[illegible] in the part of the DISTRIBUTOR THOMPSON agrees to [illegible] rebates on his net purchases on the following schedule:

Purchases during the franchise period of	Rebate of	Purchases during the franchise period of	Rebate of
$ [illegible] to $ [illegible]	[illegible]	$ [illegible] to $ 30,000.00	7%
[illegible] to [illegible]	[illegible]	30,000.00 to 45,000.00	8%
[illegible] to [illegible]	[illegible]	45,000.00 to 60,000.00	9%
[illegible] to [illegible]	[illegible]	60,000.00 to 100,000.00	10%
[illegible] to [illegible]	[illegible]	100,000.00 to 200,000.00	11%
over $200,000.00		12%	

These rebates are not retroactive.

The rebate will be allowed to the DISTRIBUTOR at the end of each calendar quarter during the franchise period.

TERM OF FRANCHISE

This agreement shall remain in force until December 31, 1949. In view of the existing unsettled general conditions, THOMPSON reserves the right to terminate the agreement at any earlier time upon giving to the DISTRIBUTOR at least 30 days written notice but without affecting any rights or obligations of either party accrued prior to such termination.

IN WITNESS WHEREOF the parties hereto have executed this contract in duplicate, at Cleveland, Ohio.

Corporation
Partnership
Individual

DISTRIBUTOR'S NAME

By _____

Title _____

Thompson Products, Inc.

Date Signed _____, 19[illegible]

By _____

Assistant Manager Sales Division

This franchise shall not become effective until accepted by Thompson Products, Inc., Cleveland, Ohio.

Respondent's Exhibits 18-A ans 18-B

[fol. 555]

Thompson Products, Inc.

Full Line Distributor's Franchise—1950

In Order to Qualify

5723
9/15/53
Moog
Moog
18-a
ofa

LITHO IN U.S.A.

Respondent's Exhibits 18-A and 18-B.

FULL LINE DISTRIBUTOR ACCOUNT

THOMPSON will sell and the DISTRIBUTOR will purchase THOMPSON merchandise listed in the THOMPSON catalog during the period of this franchise

LOWEST PRICES

The DISTRIBUTOR's orders will be billed at the prices set forth in Thompson Products Distributor's Confidential Net Price List in effect at the time of shipment

TERMS

The DISTRIBUTOR will be extended credit terms of 2% 10th Prox and net 30 days No printed or other matter on any Distributor's purchase order which is either an extension of or in contradiction to any of the terms and provisions of this franchise shall have any force or effect

All orders shall be subject to acceptance by Thompson Products, Inc., at its home office at Cleveland, Ohio

FREIGHT ALLOWANCE

Shipment of all lines covered by this franchise exceeding 100 lbs net weight made from the factory at Cleveland, Ohio, will be made F O B factory, with a freight allowance equivalent to the lowest freight rates in effect December 31, 1948 Thompson reserves the right to choose the method and route of transportation employed Parcel post, express shipments, and freight shipments less than 100 lbs F O B factory transportation collect All branch shipments will be made F O B the branch point transportation collect

WAREHOUSE SERVICE

THOMPSON will maintain branch service, unless conditions require otherwise, in Atlanta, Ga., Boston, Mass., Chicago, Ill., Cincinnati, Ohio, Cleveland, Ohio, Dallas, Texas, Denver, Colo., Detroit, Mich., Houston, Texas, Indianapolis, Ind., Jacksonville, Fla., Kansas City, Mo., Los Angeles, Calif., Memphis, Tenn., Minneapolis, Minn., New York, N Y., Oklahoma City, Okla., Omaha, Nebr., Philadelphia, Pa., Pittsburgh, Pa., Portland, Ore., Richmond, Va., St Louis, Mo., San Francisco, Calif., Seattle, Wash., and Toronto, Ont

ADVERTISING AND MERCHANDISING ASSISTANCE

THOMPSON will furnish the DISTRIBUTOR with a supply of catalogs, display material, mailing matter and other merchandising assistance to help the DISTRIBUTOR promote the sale of THOMPSON merchandise

OBSOLESCENCE AND EXCHANGE POLICY

At regular intervals, the DISTRIBUTOR will receive an "Obsolescence List" showing parts that are being declared obsolete and will be allowed a period of four weeks to return any

Respondent's Exhibits 18-A and 18-B.

[fol. 557]

[*Attachment to the Thompson Distributor Franchise cover the Distributor rates to Authorized Thompson Jobbers.*]

In regards to sales to Thompson Jobbers, the Thompson Distributor must be in a position to serve the Jobber's requirements on the Thompson Lines enumerated below

LINES

The THOMPSON lines covered by this franchise consist of the following

Pistons	*Valves*	*Water Pumps & Parts*
Piston Pins	*Valve Guides*	*Spring Washers*
Piston Pin Bushings	*Valve Springs*	*Hame Products*
Connecting Rods	*Valve Stem Keys*	*Tie Rod Sockets*
Cylinder Sleeves	*Valve Seat Inserts*	*Body Bolt Sets*
Cylinder Sleeve Assemblies	*Rotocap*	*Crankpin Bolts & Bushings*
Engine Bearings	*Independent Front Wheel Suspension Parts*	
	Oil Attachment Deals	

With the consent of Thompson, Distributor may designate Jobbers as Thompson Jobbers for the period of this Franchise No Jobber shall be entitled to be a Thompson Jobber until such Jobber has signed a Thompson Jobber's Franchise and such Franchise has been accepted in writing by Thompson To qualify as a Thompson Jobber a Jobber must carry at all times an adequate stock of all lines of Thompson merchandise under Thompson's numbers totalling not less than $1,000 00 in value of inventory Furthermore, the Thompson Jobber's annual purchases of Thompson Products must total a minimum of $1,000 00 to entitle him to renewal of Thompson Jobber Franchise for ensuing year Either party hereto with or without cause may cancel this agreement by giving the other party 30 days notice

The DISTRIBUTOR will receive a credit in the amount of 10% of his cost of merchandise on not to exceed 50% of his net purchases from THOMPSON during the period of this Franchise If said merchandise is sold by the DISTRIBUTOR to a THOMPSON Jobber at Thompson's Local Distributor net prices less 10% or at a lower price, and if such sales are reported MONTHLY on the special monthly report forms provided for this purpose by THOMPSON and the reports are received by THOMPSON within 30 days from the last day of the month in which the sales were made by the DISTRIBUTOR To eliminate the need for the DISTRIBUTOR to attach invoice copies to his report forms, THOMPSON reserves the right to make periodic inspections of the invoices issued by the DISTRIBUTOR to THOMPSON Jobbers

The DISTRIBUTOR agrees to supply the requirements of his authorized THOMPSON Jobber from his stock excepting the original stock order, and one freight shipment per month, if so desired, which may be shipped from Cleveland, Ohio On these shipments the regular Thompson freight allowance policy will apply Distributor will also furnish catalogs, price lists and regular Thompson advertising material to the Thompson Jobber

Returns of items declared Obsolete by Thompson shall be returned by the Jobber direct to Thompson at Cleveland, Ohio, via freight prepaid Credit will be issued to Distributor by Thompson, and in turn to Jobber by Distributor, in line with our regular Obsolescence Policy

Sales to persons, firms or corporations owned in whole or in part by, or managed by the DISTRIBUTOR, are not Jobber Sales within the meaning of this Franchise

5723 18-B

Moog 2nd

9/15/53 Moog

UTHO IN U.S.A.

[fol. 558]

Respondent's Exhibits 18-A and 18-B.

of these parts on this stock for full credit. After the time allowed for such return has expired these parts will not be accepted for return under any condition.

If the DISTRIBUTOR wishes to exchange slow moving merchandise for more popular items, he must write the main office of THOMPSON giving his reasons for wanting to make the exchange, accompanying the letter with a list of the parts he wishes to return. Should such return be approved by THOMPSON it will be sent to a representative who will help the DISTRIBUTOR make up an order of equal size to offset the return, and give the DISTRIBUTOR an official Return Goods Tag for making the return. This tag must be used on making any return shipment. Freight must be prepaid to Cleveland, Ohio, and the DISTRIBUTOR's account will be credited at the current price less 10% for handling. All inventory adjustments must be made between March 1, and October 31, 1950.

Finished pistons are not returnable for credit at any time. Any necessary refinishing charges on returned goods will be deducted from the value of credit memorandum.

SPOT BUYING

Spot Buying by DISTRIBUTOR of all or any part of the products covered by this FRANCHISE voids the obsolescence protection on the product line or lines of which such product or products are a part.

LINES

The THOMPSON lines covered by this franchise consist of the following:

Pistons
Piston Pins
Piston Pin Bushings
Connecting Rods
Cylinder Sleeves
Cylinder Sleeve Assemblies
Engine Bearings
Valves
Valve Guides
Valve Springs
Valve Stem Keys
Valve Seat Inserts
Rotocaps
Independent Front Wheel Suspension Parts
All Assortment Deals
Water Pumps & Parts
Spring Shackles
Harris Products
Tie Rod Sockets
King Bolt Sets
Chassis Bolts & Bushings

PURCHASE BONUS

In consideration of this support on the part of the DISTRIBUTOR, THOMPSON agrees to allow him an additional rebate, on his net purchases, on the following schedule:

Purchases during the franchise period of:	Rebate of:	Purchases during the franchise period of:	Rebate of:
$ 4,000 to $ 7,000	2%	$ 30,000 to $ 36,000	7%
7,000 to 12,000	3%	36,000 to 48,000	8%
12,000 to 18,000	4%	48,000 to 60,000	9%
18,000 to 24,000	5%	60,000 to 100,000	10%
24,000 to 30,000	6%	100,000 to 200,000	11%
Over $200,000		12%	

The rebate will be allowed to the DISTRIBUTOR in the form of a merchandise credit as soon as possible after the end of the calendar year of 1950. If the DISTRIBUTOR ceases to stock and represent the THOMPSON LINE prior to December 31st, 1950, all benefits for the total year under this plan are automatically cancelled.

[fol. 559] **Respondent's Exhibits 18-A and 18-B.**

TERM OF FRANCHISE

The agreement shall remain in force until December 31st, 1950. THOMPSON reserves the right to terminate the agreement at any earlier time upon giving to the DISTRIBUTOR at least 30 days notice but without affecting any rights or obligations of either party accrued prior to such termination.

IN WITNESS WHEREOF the parties hereto have executed this contract in duplicate, at Cleveland, Ohio.

_____ {Corporation / Partnership / Individual}
(DISTRIBUTOR'S NAME)

By _____
(Show Title)

Thompson Products, Inc.

_____ 1950 By _____
Date Signed — General Manager, Service Division

This franchise shall not become effective until accepted by Thompson Products, Inc., Cleveland, Ohio.

Respondent's Exhibit 25-A.

[fol. 560]

McQUAY-NORRIS MANUFACTURING CO.

5/23 25-a Moog 2nd 9/15/53 Moog

By CPA

EARNED PREMIUM DISCOUNT
DISTRIBUTOR SCHEDULE

1. Superseding past schedules, effective January 1st, 1946, and for the calendar year, for special effort and cooperation for volume purchases, McQuay-Norris will pay an Earned Premium Discount to their Distributors on the following scale:—

Piston Rings and Piston Expanders

RETROACTIVE

Net Purchases	*Rate*
$3,000—$4,000	5%
4,000— 5,000	7%
5,000— 6,000	9%
6,000— 7,000	10%
7,000— 8,000	11%
8,000— 9,000	12%
9,000—10,000	13%
10,000—12,000	14%
12,000—15,000	15%
15,000—18,000	16%
18,000—21,000	17%
21,000—25,000	18%
25,000—30,000	19%
30,000—Over	20%

All other Products—Except Piston Rings and Piston Expanders*

NON-RETROACTIVE

Net Purchases	*Rate*
$5,000—$10,000	2%
10,000— 15,000	3%
15,000— 20,000	4%
20,000— 25,000	5%
25,000— 35,000	6%
35,000— 45,000	7%
45,000— 55,000	8%
55,000— 65,000	9%
65,000— Over	10%

*Except on items in Paragraph 2.

2. Purchases of Mechanical Equipment—Compression-Vacuum Testers, Valve Guide Tool, Bearing Oil Leak Tester, Piston Resizing Machine, Centromatic Cylinder Gauge, etc.,—will not be included in figuring Earned Premium Discount.

3. The Earned Premium Discount; as set forth above, is based on the complete calendar year. If the distributor ceases to handle the McQuay-Norris line prior to December 31st of that year, all benefits for the total year under this plan are automatically cancelled, and any Earned Premium Discount which has been paid by McQuay-Norris to the distributor is to be refunded within thirty days.

4. Payment will be made by check semi-annually—in July and January. In computing the Earned Premium Discount on Piston Rings and Piston Expanders, the July payment shall be a sum equal to the total net purchases during the preceding six months or the portion thereof, during which this Agreement is in effect, multiplied by the Earned Premium Discount rate applicable to the *net* annual purchases of the distributor as estimated by the manufacturer.

The January payment shall be a sum equal to the total net purchases for the preceding twelve calendar months, or the portion thereof during which this Agreement has been in effect, multiplied by the Earned Premium rate applicable to the total net purchases for such twelve months (or the total net purchases for one year as estimated by the manufacturer, if this Agreement has been in effect for less than a year,) less the July Earned Premium Discount payment made during such year.

Distributor .....

Signed by .....

Jan. 2, 1946.
(1 Copy to be retained for your files.)
(1 Copy to be sent to St. Louis Office as receipt.)